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Ovid Lewis

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An Interview with Jeremiah Pangloss—A Prelude to the Constitutional Debate

Ovid C. Lewis*

Given the complex nature of nuclear weapons strategy for instituting W.W. III,—a subject (survival) for which most of us display intense feelings that tend to cloud our objectivity—I decided to ask my illustrious friend Dr. Jeremiah Pangloss, to write an introductory piece for this symposium. I know no more versatile dilettante. Not weighted down with the myopic effect of very much knowledge, he is able to see the big picture, identifying the worst and the best in any given scenario by employing the simple Procrustean strategy of ignoring the finer points of argumentation. Also, I knew that his distress over the death in 1876 of the last Tasmanian, Lalla Rookh,—an event he perceived as a manifestation of the global movement toward cultural homogeneity and concomitant loss of alternative cultures—made him acutely sensitive to the nuclear threat to our collective existence.¹ Unfortunately, I was unable to convince him to write an introduction but he did read the symposium articles and was willing to permit publication of our subsequent discussion.

OL: Dr. Pangloss, what makes you think that you possess the requisite expertise to evaluate something as technologically complex as nuclear weapons strategy?²

JP: Well, first I would point out that my legal education has enhanced

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1. See Lewis, *Universal Functional Requisites of Society: The Unending Quest*, 3 CASE W. RES. J. INT'L L. 360 (1970).

2. The problem of evaluating the risks in nuclear power generation is equally complex.

Even if the complex facts [concerning nuclear power] were completely exposed and explained by a neutral group of experts, there is little indication that the public could develop a consensus. For example, little capability exists to weigh the tradeoffs between cheaper electricity produced by nu-

my analytical skills and sense of relevance—especially the capacity to take both sides of any question. And as you know, the legally trained generalist displays the capacity to think of something inextricably connected to something else without thinking about what it is connected to. In this sense, legal analysis is value free.³ Thus, I can analyze nuclear strategy without thinking about the obscene and grotesque consequences of a nuclear blast for the three hundred million individuals killed or tortured by the blast. The Justices of the Supreme Court have frequently provided evidence of this capacity by employing neutral principles that transcend the immediate result achieved in a particularly hard case.⁴

OL: Are you suggesting that there *are* two sides to the question of survival? I thought that all sane persons agreed that survival is a minimal value without which no other value artifacts can exist! Certified geniuses from Aristotle to H.L.A. Hart have agreed on that!

JP: Well, consider Woody Allen's assessment that mankind is at the crossroads—one road leading to despair and hopelessness, the other to extinction. It's pretty much a Hobson's choice.

OL: But we have made considerable progress since Eve ate from the tree of knowledge, especially if progress is measured by the availability of conceptual schemes for ordering reality. We have solved some of our perennial problems and generally improved our problem-solving capacity. Consider Robert Nozick's assessment:

clear power reactors and the small probability of a major catastrophe. Nor does society have the experience to address the delicate question of whether or not any technology that includes a very small attached risk of catastrophe is acceptable. In addition, if all competing values could be completely explicated, no mechanisms are available for resolving strongly held preferences.

PRESIDENT'S COMM'N FOR A NATIONAL AGENDA FOR THE EIGHTIES, PANEL ON SCIENCE AND TECHNOLOGY: PROMISES AND DANGERS IN THE EIGHTIES 58 (1981).

3. See generally Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960).

4. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959). See, e.g., *Hankerson v. North Carolina*, 432 U.S. 233, 244 n.8 (1977).

The great reductionist views of Freud and Marx, computer modeling and neurophysiological reduction, behavioral psychology and economic analyses, just join and extend the long list of human accomplishments, striving, and excellence: Shakespeare and Kant and Plato and Goethe and Gandhi and the Baal Shem-Tov and Newton and Picasso and Homer and Rembrandt and Turner and George Eliot and Galileo and Tolstoy and Aurobinde and Weber and Bach and Garrison and the authors of the Hebrew Bible and Sophocles.⁵

The fact is that there “has been striking progress in the control of disease, in the methods of farming, in material productivity, in the reduction of backbreaking labor, in the techniques of rapid mass communication, in the spread of literacy and probably in the reduction in the amount of violence in everyday life.”⁶

JP: Actually, there really is no basis for assuming progress. Our exosomatic evolution—autos, telephones, telescopes, computers, etc.—has brought us to what Arthur Miller elsewhere has described as a “climacteric” or convergence of crises. We are drowning in a sea of information. So even with this “progress,” or because of it our survival is at best problematical. Probably the most comprehensive statement of the climacteric is provided by Kirkpatrick Sale:

An imperilled ecology, irremediable pollution of atmosphere and ocean, overpopulation, world hunger and starvation, the depletion of resources, environmental diseases, the vanishing wilderness, uncontrolled technologies, chemical toxins in water, air and foods, and endangered species on land and sea.

A deepening suspicion of authority, distrust of established institutions, breakdown of family ties, decline of community, erosion of religious commitment, contempt for law, disregard for tradition, ethical and moral confusion, cultural ignorance, artistic chaos, and aesthetic uncertainty.

Deteriorating cities, megalopolitan sprawls, stifling ghettos, over-

5. R. NOZICK, *PHILOSOPHICAL INVESTIGATIONS* 644 (1981).

6. Frankel, *The Idea of Progress*, 6 *THE ENCYCLOPEDIA OF PHILOSOPHY* 483, 486 (1967). The criteria for judging progress are not self-evident. See Ginsberg, *Progress in the Modern Era*, 3 *DICTIONARY OF THE HISTORY OF IDEAS* 633, 649 (1973).

crowding, traffic congestion, untreated wastes, smog and soot, budget insolvency, inadequate schools, mounting illiteracy, declining university standards, dehumanizing welfare systems, police brutality, overcrowded hospitals, clogged court calendars, inhumane prisons, racial injustice, sex discrimination, poverty, crime and vandalism, and fear.

The growth of loneliness, powerlessness, insecurity, anxiety, anomie, boredom, bewilderment, alienation, rudeness, suicide, mental illness, alcoholism, drug usage, divorce, violence, and sexual dysfunction.

Political alienation and discontent, bureaucratic rigidification, administrative inefficiency, legislative ineptitude, judicial inequity, bribery and corruption, inadequate government regulations and enforcement, the use of repressive machinery, abuses of power, ineradicable national debt, collapse of the two-party system, defense overspending, nuclear proliferation, the arms race and arms sales, and the threat of nuclear annihilation.

Economic uncertainty, unemployment, inflation, devaluation and displacement of the dollar, capital shortages, the energy crises, absenteeism, employee sabotage and theft, corporate mismanagement, industrial espionage, business payoffs and bribes, white-collar criminality, shoddy goods, waste and inefficiency, planned obsolescence, fraudulent and incessant advertising, mounting personal debt, and the maldistribution of wealth.

International instability, worldwide inflation, national and civil warfare, arms buildups, nuclear reactors, plutonium stockpiles, disputes over laws of the sea, inadequate international law, the failure of the United Nations, multinational exploitation, Third World poverty and unrepayable debt, and the end of the American imperial arrangement.

Or to put it another way:

Vietnam, Watergate, New York City bankruptcy, gas lines, Mirex, Equity Funding, ITT, riots, Medicaid fraud, redlining, CIA, drug-testing, hostages, price fixing, Vesco, nursing homes, coffee prices, product recalls, assassinations, heroin, the Middle East, Rio Rancho, Kepone, skyjacking, the SLA, Hustler, Spiro Agnew,

saccharin, the square tomato, Harlequin books, Los Angeles, OPEC, Wilbur Mills, power failures, My Lai, Charles Manson, PCB, the SST, Andy Warhol, Appalachia, organized crime, Three Mile Island, Valium, the Wilmington 10, REITs, TV violence, strip-mining, FBI break-ins, the Sahel, microwaves, McDonald's, Kent State, Penn Central, Attica, the Torrey Canyon, psychosurgery, mercury, and Chile . . .⁷

OL: But then the dilemma confronting us is of our own making. We have developed a honeycombed store of knowledge, with disciplines segregated to the extent that experts are afflicted with specialized deafness. We question whether it is even possible to see the big picture while applying the knowledge and techniques of the diverse and sophisticated disciplines required to resolve the complex problems of our climacteric era.

Moreover, the classical boundaries of the earth sciences—geology, meteorology, oceanography, and so on—are being eroded and replaced by a planetary multidisciplinary view. For example, portraying and understanding the long-term evolution of climate depends on understanding the movement of crustal plates and the interpretation of deep-sea cores and sediment samples. Understanding and predicting the shorter period changes in climate depends on knowledge of the oceans, their temperature, currents, ability to act as a reservoir, and their role in the global energy cycle.

A central theme is that the new knowledge gained by the vigor of earth sciences and by pertinent technology is now vital to the wise management of our planet. Plate tectonics is essential to the effort to understand and predict earthquakes and to improve reconnaissance for new mineral deposits. Atmospheric chemistry enables us to make a reasoned estimate of the likely future effects of trace amounts of chlorofluoromethanes on trace amounts of ozone in the stratosphere. Basic work in marine biology and ecology is indispensable to structuring effective policies for managing the living resources of the seas. Research on the chemistry of ocean water will enable us to fix more precisely the role of the oceans as a reservoir for CO₂, helping to yield, in time, precise estimates of the climatic effects of CO₂ and a more rational base on which to plan the future

7. K. SALE, HUMAN SCALE 21-22 (1980).

use of fossil fuels.

Our appraisal of recent trends in the earth sciences is dominated by the role of technology and the approach to planetary problems through organized and collaborative efforts of institutions and scientists—big science. There is a current question about big science and its relation to the science of individual investigators. It should be noted that the big science effort described here grew from little science—the ideas of individuals—and provide to individual scientists data that could be obtained in no other way.⁸

JP: The best response to the question you posed concerning my competence in matters as complex as nuclear weapons strategy was supplied by the physicist Erwin Schrodinger: “I can see no escape from this dilemma . . . than that some of us should venture to embark on a synthesis of facts and theories, albeit with second-hand and incomplete knowledge of some of them—and at the risk of making fools of ourselves.”⁹

OL: And what then is your assessment of the current state of affairs?

JP: I think the big picture comes into focus by telescoping our finite existence on this globe into a thirty-day span. During the first 29 days, 22-½ hours, mankind was a nomadic predator. Only during the last hour and 25 minutes did he settle into farming and in the last five minutes he finally moved to an urban setting. Within this time frame the Renaissance consumed 4 minutes, the Industrial Revolution 1-½ minutes, and the Electronic Era 10 seconds.¹⁰ The acceleration in rate of change and technological capacity is quite apparent. During the last moments of our 30 days, the ineluctable movement toward annihilation

8. SCIENCE AND TECHNOLOGY 50 (National Academy of Sciences 1979). It is suggested that international as well as interdisciplinary collaboration is also necessary for progress. See *id.* at 14-15.

9. E. SCHRODINGER, *WHAT IS LIFE?* vii (1945).

10. There is considerable disagreement among anthropologists concerning man's first appearance on this planet. “Lucy” appeared 3.5 million years ago, and other hominids over 5 million years ago. See evolutionary chart in D. JOHANSON & M. EDEY, *LUCY: THE BEGINNINGS OF HUMANKIND* 10-11 (1982). Compare the earlier (and now obviously erroneous) chart in 1 W. DURANT, *THE STORY OF CIVILIZATION: OUR ORIENTAL HERITAGE* 90 (1954).

of the human species is equally obvious. How clear it now appears, even though each early step was at the time taken, apparently innocuous. Consider the following annihilation schedule:

ANNIHILATION SCHEDULE

	1300:	Cannon
	1440:	Printing Press
	1500:	Rifle
	1776:	Submarine
	1835:	Revolver
	1863:	TNT
	1896:	Radio-Telegraph
	1903:	Airplane
	1905:	Einstein proposes theory for transformation of matter into energy: $E = mc^2$
	1926:	Liquid Fuel Rocket
	1928:	Mechanical Computer
	1933:	Harold Urey isolates heavy hydrogen
	1939:	Fission in uranium discovered
	1942:	First nuclear chain reaction in the Chicago pile
	1945:	First test of A-bomb at Alamogorda, New Mexico
August 6,	1945:	First obscene use of A-bomb at Hiroshima
	1946:	Electronic numerical integrator and calculator (ENIAC), first all-electronic computer
	1952:	H-bomb tested at Eniwetok
	1954:	H-bomb exploded producing twice anticipated destructive effect. John Foster Dulles propounds strategy of massive retaliation.
October 4,	1957:	Sputnik I

- 1960: Era of nuclear plenty (more than 1000 nuclear weapons available). Atlas Missile has CEP (circular error probable indicating the radius of the circle within which 50% of missiles will land) of several miles.
- December, 1960: SIOP (single integrated operational plan) requires all-cities strategy with estimated death toll of 360-450 million people in communist sphere.
- June, 1962: SIOP II adopts more flexible nuclear strategy of escalation of destruction.
- July 8, 1962: 1.4 Megaton H-bomb 248 miles over Johnson Island generates EMP (electromagnetic pulse) of peak 6 megawatts/sq. meter.
- October, 1962: Cuban Missile Crisis
- 1969: NIE (CIA's National Intelligence Estimate of Soviet Nuclear strike capability) assumes parity. Russian SS-9s (armed with 3 warheads each with 7-10 megaton force) are aimed at U.S. LCCs (launch control centers) in the Midwest.
- 1970: U.S. develops MIRVs (multiple independently targetable re-entry vehicles).
- 1974: NSDM 242 (National Security decision memorandum) propounds Schlesinger doctrine of limited nuclear war.
- 1975: NIE assumes nuclear parity not attained by Russians until mid-1980s. U.S. Minuteman III Missile with Mark 12A warhead (350 kiloton force) has CEP of one tenth of a nautical mile.
- 1977: Russia develops MIRVs with low CEP. Window of vulnerability develops.

- July, 1980: PD 59 (presidential directive) sets forth nuclear war strategies.
- 1982: Russian SS-19s acquire new front end with 90% PK (probability of kill) on minuteman missile silos. Opens wider window of vulnerability.
- November 22, 1982: MX dense pack strategy adopted.

The inventiveness of *homo faciens* has produced better and better means of assuring our destruction. But while technological exosomatic evolution has occurred, the human nature of *homo sapiens* has remained unchanged—and in his natural state we know that “the life of man [is] solitary, poore, nasty, brutish, and short.”¹¹ The combination of MIRVs with a low CEP and high PK produced a situation that compelled Carter to issue PD 59, rejecting a MAD strategy in favor of a policy requiring the U.S. military “to be able to undertake precise, limited nuclear strikes against military facilities in the Soviet Union, including missile bases and troop concentration, [and] to develop the capacity to threaten Soviet political leaders in their underground shelters in time of war.”¹²

OL: But that sounds as though fighting a nuclear war *is* considered a reasonable option? I would have thought no sane person would even consider that. Do you really believe the leader of a State would initiate a nuclear war and thereby risk destruction of our civilization?

JP: Well, Harry Truman [who authorized Hiroshima’s destruction] was sane and he, at the time of the Korean War, contemplated a nuclear attack, although he had removed General MacArthur for urging all-out war. Truman wrote in a January 27, 1952, memorandum:

It seems to me that the proper approach now would be an ultimatum with a 10-day expiration limit, informing Moscow that we intend to blockade the China coast from the Korean border to Indochina, and that we intend to destroy every military base in

11. T. HOBBS, LEVIATHON OR THE MATTER, FORME & POWER OF A COMMONWEALTH ECCLESIASTICAL AND CIVILL *62.

12. N.Y. Times, Aug. 6, 1980, at 1, col. 1.

Manchuria by means now in our control—and if there is further interference we shall eliminate any ports or cities necessary to accomplish our purposes.

This means all-out war. It means that Moscow, St. Petersburg, Mukden, Vladivostok, Peking, Shanghai, Port Arthur, Darien, Odessa, Stalingrad and every manufacturing plant in China and the Soviet Union will be eliminated.¹³

There were, of course, other times when we came close—with Eisenhower in 1953 (Korean War), Kennedy in 1962 (Cuban Missile Crisis), Kissinger in 1973 (Arab-Israeli October War), and Carter in 1979 (Iran Crisis). The fact is that we could end up with a war because of computer error. Tom Wicker recently reported that there were “151 computer false alarms in an 18 month period” and that one false alarm “had American forces on alert for a full six minutes before the error was discovered.”¹⁴ Add more powerful missiles and more countries with nuclear weapons and the outcome is bleak at best.¹⁵

OL: But our civilization would not survive—at least not in any form identifiable by us.

JP: Edward Teller doesn’t think a nuclear war would be all that bad. He suggests that we certainly could survive—as long as we acted rationally—including wiping the fallout ash from our skin.¹⁶

OL: But what about the effects of the EMP?

JP: I suppose all data encoded on microchips would disappear. Given the extent to which our society relies on an information network using microchips, that could be somewhat disastrous.¹⁷ Of course, the mili-

13. N.Y. Times, Sunday, Aug. 3, 1980, at 22, col. 1.

14. N.Y. Times, Sunday, Nov. 21, 1982, at EY21, col. 1. Defense experts suggest that the Russian detection systems are even more prone to error. Whew!

15. For an apocalyptic’s view see H. LINDSEY, *THE 1980’S: COUNTDOWN TO ARMAGEDDON* (1980).

16. “Skin contact with fallout is not necessarily fatal—depending on the intensity of the radiation and the precautions taken. Injuries can be reduced simply by washing off the ash.” Teller, *Dangerous Myths About Nuclear Arms*, *READERS DIGEST*, Nov. 1982, at 139, 141.

17. Daniel Bell reports that by 1980, 51.3 percent of our experienced civilian

tary has taken measures to protect the C³ of C³I (command, control, communication, and intelligence) from EMP. I think Thomas Powers' assessment is more accurate than that of Teller:

Strategic planners hesitate to say what the world would be like after a nuclear war. There are too many variables. But they agree—for planning purposes, at any rate—that both sides would “recover,” and that the most probable result of a general nuclear war would be a race to prepare for a second general nuclear war. As a practical matter, then, a general nuclear war would not end the threat of nuclear war. That threat, in fact would be one of the very few things the pre-war and post-war worlds would have in common.¹⁸

OL: It seems almost inevitable that given our organization for nuclear war, that it will surely occur. There are several haunting stanzas in the Rubaiyat of Omar Khayyam that I can't help but recall:

We are no other than a moving row
of magic shadow-shapes that come and go
Round with the sun-illumin'd lantern held
In midnight by the master of the show;

But helpless pieces of the game he plays
Upon this checquer-board of nights and days;
Hither and thither moves and checks and slays,
and one by one back in the closet lays.¹⁹

Do you believe that the probability of nuclear war would be reduced if the Supreme Court persuasively propounded a doctrine that there is a

workforce was involved in the information business. Further, that the “axial principles of the post-industrial society, however, is the centrality of theoretical knowledge and its new role, when codified, as the director of social change.” Bell, *The Social Framework of the Information Society*, in *THE MICROELECTRONICS REVOLUTION* 500 (T. Forester ed. 1980).

18. Powers, *Choosing a Strategy for World War III*, 250 *THE ATLANTIC*, No. 5, Nov. 1982, at 82, 110.

19. *THE RUBAIYAT OF OMAR KHAYYAM* (E. Fitzgerald trans. 1859).

constitutional duty to avoid a nuclear war?

JP: Well, that question is almost too speculative for me to answer. First, what constitutional provision would impose such a duty? I can agree that a natural law proponent could contend that there is a duty to seek survival. One of the clearest statements appears in the *Summa Theologica*, where St. Thomas states that "the natural law contains all that makes for the preservation of human life, and all that is opposed to its dissolution."²⁰ But even for the Thomistic natural law proponent,

20. T. AQUINAS, *Summa Theologica*, in AQUINAS: SELECTED POLITICAL WRITINGS 123 (A. D'Entreves ed. 1959). Note: Interestingly, the *Summa Theologica* was incorporated into Catholic doctrine by an encyclical of Pope Leo XIII. See C. MORRIS, THE GREAT LEGAL PHILOSOPHERS 57 (1959). Catholics are thus bound, at least in theory, to St. Thomas' call for an active opposition to "dissolution." Catholics do appear to support opposition to nuclear weapons more frequently than Non-Catholics. A recent Gallup Poll indicates the following:

Unilateral Nuclear Freeze

"Do you favor or oppose a freeze on the production of nuclear weapons whether or not the Soviet Union agrees to do the same?"

	Favor	Oppose
National	45	55
Catholics	47	53
Non-Catholics	45	55

Dilateral Nuclear Freeze

"Do you favor or oppose an agreement between the United States and the Soviet Union not to build any more nuclear weapons in the future?"

	Favor	Oppose	No Opinion
National	77	17	6
Catholics	82	13	5
Non-Catholics	76	18	6

Reduce Nuclear Arsenals

"Would you approve or disapprove if President Reagan made a proposal to the Soviet Union that both countries reduce their present stock of nuclear weapons by 50 per cent?"

	Favor	Oppose	No Opinion
National	76	19	5
Catholics	81	16	3
Non-Catholics	73	21	6

there would be many troubling issues before exercising a duty to resist positive law supporting nuclear strike capability.²¹ Aquinas' theory of resistance requires only that where positive law is contrary to the common good, it is not to be obeyed *unless* the disobedience is more onerous than the evil occasioned by obedience to an unjust law. Of course, if the Divine law is violated then one must resist—and perhaps survival of God's creation is mandated by the Divine Law requiring man to be "fruitful and multiply."²² But *which* nuclear weapon strategy will deter a war is a subject of considerable debate. Agreeing to do good and avoid evil is far easier than determining what particular acts will further this primary precept. The same is true for survival.

OL: But what about a constitutional duty? Do you see any realistic argument for establishing such a duty?

JP: There are a number of difficulties. First, what provision in the Constitution is available for serving as a basis for such a duty? Recall that the Court in the *Rodriguez* case stated that only rights explicitly or implicitly guaranteed by the Constitution are to be considered fundamental enough to impose the strict scrutiny standard of review.²³

OL: If interstate travel, privacy, procreation, voting, and education are fundamental rights implicit in the constitution, then why not a right of

Destroy Present Weapons

"Would you favor or oppose an agreement between the U.S. and the Soviet Union to destroy all nuclear weapons that have already been built?"

	Favor	Oppose	No Opinion
National	47	44	9
Catholics	50	42	8
Non-Catholics	46	44	10

Catholics back stand on Missiles, Miami Herald, Sunday, Nov. 21, 1982, at A32, col. 1.

21. Concerning the ambiguities and difficulties inherent in a natural law approach see Kelsen, *Plato and the Natural Law*, 14 VAND. L. REV. 23 (1960); Neilsen, *An Examination of the Thomistic Theory of Natural Moral Law*, 4 NATURAL L.F. 44 (1959). See *infra* note 38.

22. *Genesis* 2:28 (King James).

23. *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973).

survival?

JP: You are forgetting that the threat to survival is not a personal right, but one shared by everyone. The Court probably would deny standing to even raise the issue—whether in the context of failure to comply with the “law” on the part of the executive or legislative branch or infringement on the assumed [*arguendo*] right of survival. Recall the recent statement by the Court:

[The] requirements of standing are not satisfied by “the abstract injury in nonobservance of the Constitution asserted by . . . citizens.” *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. at 223, n. 13, 94 S. Ct., at 2933, n. 13 (1974). This Court repeatedly has rejected claims of standing predicated on “the right, possessed by every citizen, to require that the Government be administered according to law. . . .” *Fairchild v. Hughes*, 258 U.S. 126, 129 [42 S. Ct. 274, 275, 66 L. Ed. 499] [1922].” *Baker v. Carr*, 369 U.S. 186, 208, 82 S. Ct. 691, 705 L. Ed. 2d 663 (1962). See *Schlesinger v. Reservists Committee to Stop the War*, *supra*, 418 U.S. at 216-222, 94 S. Ct. at 2929-2932; *Laird v. Tatum*, 408 U.S. 1, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972); *Ex parte Levitt*, 302 U.S. 633, 58 S. Ct. 1, 82 L. Ed. 493 (1937). Such claims amount to little more than attempts “to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government.” *Flast v. Cohen*, 392 U.S., at 106, 88 S. Ct., at 1956.²⁴

If standing was found, then the Court still might refuse to reach the merits finding that the issue is a political question because such a case would present either, in the Court’s words—

24. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, ___ U.S. ___, 102 S. Ct. 752, 764 (1982). Another variation on the standing theme relates to the requirement that the judicial resolution of the constitutional issue will produce the relief desired by the plaintiff. See *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973). Imposing a duty on *our* government to eliminate the threat of nuclear war would not eliminate the threat from other countries, and indeed, some would contend, would only heighten the likelihood of the apocalypse. One can hear Chairman Andropov paraphrasing President Jackson: “The Court has made its decision. Let it enforce it.”

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for questioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.²⁵

Or, given the complexity of the issue and expertise required to appreciate the nuances involved, the Court could invoke some variation of the abstention doctrine. After all, in *Horowitz*, the Court admitted "courts are particularly ill-equipped to evaluate academic performance."²⁶ *A fortiori*—nuclear weapons strategy! The Court has frequently manifested deference to the Executive Branch in matters of national security.²⁷

OL: But assuming, *arguendo*, that the Court would hear the case, why wouldn't the Justices agree that there is a constitutional duty based on the fundamental right of survival.

JP: Frankly, I don't think the predicate exists for establishing such a right. Consider the length of time and number of incremental steps involved in the evolution of constitutional rights of privacy²⁸ and inter-

25. *Baker v. Carr*, 369 U.S. 186, 217 (1962). See also *United States v. Nixon*, 418 U.S. 683, 704-05 (1974). The Court would probably apply the same doctrine to arguments of invalid delegation of legislative power to the executive in the area of foreign affairs and national security. Given the temporal proximity to *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) of *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) and *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), it appears the Court has assumed that even if the delegation doctrine was applicable in other contexts, it would not apply in the area of foreign affairs. Of course, more recently the Court has upheld extremely broad delegations of legislative authority. See, e.g., *Lichter v. United States*, 334 U.S. 742 (1948).

26. *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 92 (1978).

27. See, e.g., *United States v. Nixon*, 418 U.S. 683, 706-07 (1974); *United States v. Reynolds*, 345 U.S. 1, 11 (1953).

28. For discussion see Warren & Brandeis, *The Right to Privacy*, 4 HARV.

state travel.²⁹ And the right of procreation you mentioned is considered as "among the rights of personal privacy protected under the Constitution."³⁰ By the way, the right to vote in state elections is not a fundamental right. The Court on numerous occasions has indicated that the federal Constitution "does not confer the right of suffrage upon any one."³¹ Of course, where the state does grant the right to vote, it must do so on an equal basis.³² The Court applies a strict scrutiny test in such circumstances because it views the franchise once granted, as "preservative of all [other] rights."³³

OL: But I recall that the Court actually stated in *Yick Wo* that the political franchise of voting is "a fundamental right because preservative of all rights" and in 1964 in *Reynolds v. Sims*, the Court reaffirmed the same idea, stating:

Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise

L. REV. 193 (1890); Note, *The Right to Privacy Today*, 43 HARV. L. REV. 297 (1929); Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 725 (1937); Nizer, *The Right of Privacy—A Half Century's Developments*, 39 MICH. L. REV. 526 (1941); Feinberg, *Recent Development in the Law of Privacy*, 48 COLUM. L. REV. 713 (1948). The Court's discussion of judicial antecedents appears in the various opinions in *Griswold v. Connecticut*, 381 U.S. 479 (1965). A similar incremental sequence occurred in the development of the fundamental right to marry. See *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978). Concerning the development of the fundamental right of personal choice in matters of family life, see *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977).

29. See *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868); *Edwards v. California*, 314 U.S. 160 (1941); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

30. *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 35 n.76 (1973).

31. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1875), *quoted with approval in Rodriguez v. Popular Democratic Party*, ___ U.S. ___, 102 S. Ct. 2194, 2199 (1982). In *Rodriguez*, the Court observed that "the right to vote, *per se*, is not a constitutionally protected right." *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973).

32. Of course the same is true of the right to an appeal. See *Douglas v. California*, 372 U.S. 353 (1963). In situations abridging rights which *where* granted are subject to heightened analysis, the Court often requires that the right be absolutely denied to justify relief. See *Ross v. Moffitt*, 417 U.S. 600 (1974); *Plyler v. Doe*, ___ U.S. ___, 102 S. Ct. 2382 (1982).

33. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.³⁴

Isn't this true of the right to survive? After all, if we cease to exist, no rights—voting, expression, etc.—are preserved. And given this, why not an implied constitutional duty to eliminate the threat to survival now—since it is absurd to wait until our extinction is certain to occur.³⁵

JP: Your analysis might apply in cases where the state grants a right not naturally held by its citizens and where there is a nexus between that right and exercise of other constitutional rights. The Court recently has gone one step further, holding that deprivation of access to a basic education (also not a fundamental right) in certain contexts, is subject to a heightened level of scrutiny.³⁶ But there, as in the case of voting, a substantive nexus was found between the right granted and other explicit rights in the Constitution—e.g., freedom of expression guaranteed by the First Amendment. There simply is no substantive connection between your proposed right of survival and any existing constitutional rights. Further, your existence is not granted by the State, but is acquired through natural processes beyond the control of the State.³⁷ Aren't we back to a natural law argument?³⁸

34. *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). *See also* *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667 (1966).

35. In another context, less fraught with an imminent threat to national security, the Court adopted the gravity of the evil test, which *mutatis mutandis*, appears applicable here. *See* *Dennis v. United States*, 341 U.S. 494, 510 (1951). This test was most recently used by Justice Burger in *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 562 (1976).

36. Where children of aliens unlawfully present in the United States were absolutely denied access to public education, the Court in *Plyler v. Doe*, ___ U.S. ___, 102 S. Ct. 2382 (1982) appears to apply the middle level review utilized in gender discrimination, *Craig v. Boren*, 429 U.S. 190 (1976); *Mississippi Univ. for Women v. Hogan*, ___ U.S. ___, 102 S.Ct. 3331 (1982), and illegitimacy-legitimacy classifications. *Mills v. Habluetzel*, ___ U.S. ___, 102 S. Ct. 1549 (1982).

37. *But see* *Roe v. Wade*, 410 U.S. 113 (1973).

38. Of course, in earlier times incorporation of natural law into our jurisprudence was not unusual. *See generally* Corwin, *The "Higher Law" Back-*

OL: I suggest that there is a clear nexus to the explicit guarantee of a right to life, which cannot be taken without affording due process of law. Further, life cannot be taken in a manner that violates the Eighth Amendment's proscription of cruel and unusual punishments. The Court has held invalid imposition of capital punishment on a robber, even when he is present at a robbery where a murder is committed, since robbery is not a crime "so grievous an affront to humanity that the only response may be the penalty of death."³⁹ We have not even committed a crime. Where is our due process? Isn't imposition of extinction cruel and unusual? Isn't the psychological torment of a nuclear sword of Damocles itself a cruel and unusual punishment?

JP: The short of it is that the state is not imposing any punishment on anyone. All the provisions you cite were not designed to protect survival of the species. The Court's resolution of the arguments you raise is adumbrated in its opinion in the student paddling (beating) case holding the Eighth Amendment not applicable.

The prisoner and the school child stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration. The prisoner's conviction entitles the State to classify him as a "criminal," and his incarceration deprives him of the freedom "to be with family and friends and to form the other enduring attachments of normal life." *Morrissey v. Brewer*, 408 U.S. 471 (1972).⁴⁰

I think you can see the difference. It's like the black citizen subjected to the existence of a racially segregated park (unconstitutional),⁴¹ as

ground of American Constitutional Law, 42 HARV. L. REV. 149 (1928), 42 HARV. L. REV. 365 (1929). This is no longer fashionable. Today "no one wants to be called a natural lawyer. Natural law insists that what the law is depends in some way on what the law should be. This seems metaphysical or at least vaguely religious. In any case it seems plainly wrong." Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165 (1982).

39. *Enmund v. Florida*, ___ U.S. ___, 102 S. Ct. 3368, 3377 (1982) (quoting from *Gregg v. Georgia*, 428 U.S. 153, 184 (1976)). See also *Coker v. Georgia*, 433 U.S. 584 (1977).

40. *Ingraham v. Wright*, 430 U.S. 651, 669 (1977).

41. *Evans v. Newton*, 382 U.S. 296 (1966).

opposed to having no park at all (constitutional).⁴² But even if I were to agree that there was a fundamental right somehow involved, and a concomitant duty to eliminate a threat to our individual and collective existence, that would at best only impose a standard of strict scrutiny. This is not an absolute and automatic test invalidating government action or inaction. And in every instance where the state considers its very existence in peril, the Court has found a sufficiently compelling governmental interest to justify subordination of any right proposed—whether under the First Amendment,⁴³ privacy⁴⁴ or even the right not to be subjected to invidious racial classifications subsumed within the due process clause of the Fifth Amendment.⁴⁵ As a noted constitutional scholar has concluded: “The Court has never ruled against the state in any matter of consequence.”⁴⁶

And so, my friend, our conclusion is that the Court will not involve

42. *Evans v. Abney*, 396 U.S. 435 (1970).

43. *See, e.g., Barenblatt v. United States*, 360 U.S. 109 (1959). A national security interest can justify even a prior restraint. *Near v. Minnesota*, 283 U.S. 697, 716 (1931). *See also New York Times Co. v. United States*, 403 U.S. 713, 726 (1971) (Brennan, J., concurring).

44. *Roe v. Wade*, 410 U.S. 113 (1973). It is interesting that the Court in *Roe* cited favorably *Jacobson* and *Bell*:

[I]t is not clear to us that the claim asserted . . . that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson v. Massachusetts*, 197 U.S. 11, 49 L. Ed. 643, 255 S. Ct. 358 (1905) (vaccination); *Buck v. Bell*, 274 U.S. 200, 71 L. Ed. 1000, 47 S. Ct. 584 (1927) (sterilization).

410 U.S. at 154.

45. The due process clause of the Fifth Amendment prohibits invidious discrimination. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Accordingly, strict scrutiny is applied where racial classifications are employed—a doctrine that also was developed only incrementally over a considerable period of time. *See Powell, Carolene Products Revisited*, 81 COLUM. L. REV. 1087 (1982); Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). Even so, the Court justified severe restrictions on the rights of citizens of Japanese ancestry during World War II based on “pressing public necessity” and “the military urgency of the situation.” *Korematsu v. United States*, 323 U.S. 214, 216, 223 (1944).

46. A. MILLER, *DEMOCRATIC DICTATORSHIP* 194 (1981).

itself in this dispute. This choice is really ours to make. The bottom line is eloquently expressed by Jonathan Schell:

One day—and it is hard to believe that it will not be soon—we will make our choice. Either we will sink into the final coma and end it all or, as I trust and believe, we will awaken to the truth of our peril, a truth as great as life itself, and, like a person who has swallowed a lethal poison but shakes off his stupor at the last moment and vomits the poison up, we will break through the layers of our denials, put aside our fainthearted excuses, and rise up to cleanse the earth of nuclear weapons.⁴⁷

47. J. SCHELL, *THE FATE OF THE EARTH* 231 (1982).

Nuclear Weapons and Constitutional Law

Arthur S. Miller*

Introduction

The time has come for lawyers to confront the question of whether nuclear weapons—their manufacture, deployment, and use—can be justified under either constitutional or international law. Since the explosions of primitive atomic bombs at Hiroshima and Nagasaki in 1945 it has been assumed, without much thought, that there is nothing unlawful about those weapons. This paper is a preliminary statement that suggests the contrary. It is predicated on two observations of Alfred North Whitehead: “The doctrines which best repay critical examinations are those which for the longest period have remained unquestioned;”¹ and “almost all really new ideas have a certain aspect of foolishness when they are first presented.”² What follows is a brief outline in which I contend that it is not really foolish for law and lawyers to contribute to the growing debate about nuclear war.

People throughout the world live today under the threat of a nuclear arms “race” that is madly out of control. That peril has at long last—almost forty years after the bombs dropped on Hiroshima and Nagasaki—percolated into the thinking of growing numbers of men and women who have swelled into a spontaneous popular movement against the ultimate danger. Their motivations, as perceived by Ambassador George Kennan, include:

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1. Whitehead, as quoted in Miller, *A Note on the Criticism of Supreme Court Decisions*, 10 J. PUB. L. 139 (1961).

2. Whitehead, as quoted in A. BRECHT, *POLITICAL THEORY: THE FOUNDATIONS OF TWENTIETH-CENTURY POLITICAL THOUGHT* 262 (1959) (paperback ed. 1967).

a growing appreciation by many people of the true horrors of a nuclear war; a determination not to see their children deprived of life, or their civilization destroyed, by a holocaust of this nature; and finally . . . , a very real exasperation with their governments for the rigidity and traditionalism that cause those governments to ignore the fundamental distinction between conventional weapons and weapons of mass destruction and prevents them from finding, or even seriously seeking, ways of escape from the fearful trap into which the cultivation of nuclear weapons is leading us.³

Members of the clergy, physicians, scientists, and businessmen have grasped and sought to show to others the meaning of nuclear war.

With rare exceptions, lawyers until very recent times have been mute. They have assumed, if they thought about it, that nuclear weapons are just another means of killing—a bit more powerful but not essentially different from the long bow, the machine gun, the tank, and the airplane. That assumption is simply not accurate.

Some lawyers, mainly those in international law, have begun to challenge the assumption of legality of nuclear weaponry. The Lawyers Committee on Nuclear Policy has recently been formed, with headquarters in New York City. The Committee's position is that nuclear weapons are incompatible "with the core precepts of international law."⁴ The Committee believes that "nuclear warfare would lead to results incompatible with fundamental rules of international law, elementary morality, and contrary to any rational conception of national interest and world order. . . . The very nature of nuclear warfare is destructive of all the values which law obligates us to preserve."⁵

3. Kennan, *On Nuclear War*, THE N.Y. REVIEW, Jan. 21, 1982, at 8. See Molander, *How I Learned to Start Worrying About Nukes*, Manchester Guardian Weekly, April 4, 1982, at 17 (reprint from the Washington Post). For the view of physicians, see Kerzner, *The Last Epidemic*, Miami Herald, March 7, 1982, at E1, col. 1 where it states, "Nuclear war could be the last epidemic our civilization will know. Hundreds of millions of people would be killed or injured, and the economic, ecological and social fabric on which human life depends would be shattered."

4. Weston, *Clergy, Doctors, Business-and now the Lawyers*, Des Moines Register, March 27, 1982, at A9, col. 1. Professor Weston of the University of Iowa quotes Chicago banker Ervin Salk to the effect that the nuclear arms race "is tearing the guts out of our economy just like Vietnam did."

5. LAWYERS COMMITTEE ON NUCLEAR POLICY, STATEMENT ON THE ILLEGALITY OF NUCLEAR WEAPONS 7 (undated). The Committee's purpose is to initiate a dialogue

No one has yet asked the constitutional question: Does the manufacture, deployment, and possible—even probable—use of nuclear weapons contravene the Constitution? This paper is a preliminary inquiry into that question. It is an outline, presenting possible constitutional arguments, rather than a full-dress exposition. In the well-known but little heeded words of Albert Einstein, “the unleashed power of the atom has changed everything save our modes of thinking, and we thus drift toward unparalleled catastrophe.”⁶ So we do: I contend in this brief paper that the time has come—indeed, it is long past—to change “our modes of thinking” about the constitutionality of nuclear weapons.

My conclusion may be simply stated: An argument based on the goal-seeking nature of constitutionalism, together with at least four other constitutional arguments, invalidate the presumption of constitutionality. These arguments will be discussed in detail later. This is not to say that the Supreme Court would sustain these arguments, were a case to be brought. Rather, it is to say that as a part of the dialogue that is beginning about the legality of nuclear weapons the dimension of constitutional law cannot be ignored—it is not enough to argue that those weapons are incompatible with international law—as surely they are.

At the outset, I readily concede the jurisprudential problem of whether legal norms (rights) can exist absent a means of enforcement. That, however, should not stay the inquiry into the relevance of constitutional prescriptions to the nuclear threat. As long ago as 1803, in the famous case of *Marbury v. Madison*⁷ that established the Supreme Court’s power of judicial review, Chief Justice John Marshall acknowledged that Mr. Marbury was entitled to his commission as a justice of the peace but went on to assert that there could be no judicial enforcement of that right. Congress, Marshall held, had constitutionally erred in trying to enlarge upon the original jurisdiction of the Supreme Court. Furthermore, until recent decades, a number of now-recognized

regarding the legitimacy of nuclear weapons under international law. (The present essay seeks to expand that focus to encompass constitutional law.) The Committee’s address is 777 United Nations Plaza (5th Floor), New York, N.Y. 10017. (In the interests of disclosure, I am a member of the Consultative Council of the Committee.)

6. J. SCHELL, *THE FATE OF THE EARTH* 188 (1982).

7. 5 U.S. (1 Cranch) 137 (1803).

constitutional rights such as the right to privacy, one person/one vote, and racial desegregation were not given judicial cognizance. The history of American constitutional law is one of an expanding number of rights brought into being, in one way or another, by the Supreme Court or other constitutional decisionmakers. In philosophic terms, law—including constitutional law—has always been instrumental. Rather than being a fixed body of pre-existing immutable principles, it is goal-seeking, purposive—a type of human activity that exists for identifiable ends. In addition, constitutional law has been and is relative to circumstances. Necessity is the mother of constitutional law which is constantly in a state of “becoming.”⁸

More than 40,000 nuclear weapons now exist, and more are being produced each week. Russia has enough to wipe out every American city of 1500 or more people. The United States has an even larger stockpile. And nuclear capacity is proliferating. France, Great Britain, India, China, for certain, and Israel, South Africa and perhaps Brazil also have significant nuclear weaponry. Enough “overkill” already exists in amounts sufficient to vaporize every living human being on earth today. And yet political officers in the world’s capitals continue a mad “race” for supremacy.

This essay is emphatically not a plea for unilateral disarmament. We live in a Hobbesian world, a condition not at all likely to change. The essence of my argument is that those who wield both formal authority and effective control in the American constitutional order have a duty to take action designed to eliminate the nuclear threat throughout the world. The duty, I maintain, is of constitutional dimension. The ultimate goal has been stated recently by Billy Graham as the elimination of *every* weapon of mass destruction in the world.

The Philosophical Basis of Constitutionalism

The text of the ensuing discussion comes from Justice Felix Frankfurter and the French legal philosopher, Leon Duguit. Said Frankfurter in 1949: “It is of the very nature of a free society to advance in its

8. For discussion, see A. MILLER, *DEMOCRATIC DICTATORSHIP: THE EMERGENT CONSTITUTION OF CONTROL* (1981); A. MILLER, *TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT* (1982).

standards of what is deemed reasonable and right.”⁹ Said Duguit in 1919: “Any system of public law can be vital only so far as it is based on a given sanction to the following rules: First, the holders of power cannot do certain things; second, there are certain things they must do.”¹⁰

This, then, is an exercise in American constitutionalism. As a concept, constitutionalism has usually had, at least in the United States, a normative connotation, as witness the following definitions. “Constitutionalism,” Friedrich Hayek maintains,

means that all power rests on the understanding that it will be exercised in accordance with commonly accepted principles, that the persons on whom power is conferred are selected because it is thought that they are most likely to do what is right, not in order that whatever they do should be right.¹¹

To Daniel Bell it is “the common respect for the framework of law, and acceptance of outcomes under due process.”¹² Walter F. Murphy maintains that “[t]he fundamental value that constitutionalism protects is human dignity.”¹³ And to Charles McIlwain “constitutionalism has one essential quality: it is a legal limitation on government.”¹⁴ In sum, constitutionalism in America is more than a process—more than procedure alone—but has a substantive, normative, content looking toward the responsibility, as McIlwain put it, of government to the governed. James Madison said it well in *The Federalist No. 51*: “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”¹⁵

As “officers of the courts” lawyers have a quasi-governmental sta-

9. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

10. L. DUGUIT, *LAW IN THE MODERN STATE* 26 (H. Laski trans. 1919).

11. F. HAYEK, *THE CONSTITUTION OF LIBERTY* 181 (1960).

12. Bell, *The End of American Exceptionalism*, 41 *PUB. INTEREST* 193 (1975).

13. Murphy, *An Ordering of Constitutional Values*, 53 *S. CAL. L. REV.* 703, 758 (1980).

14. C. MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 21 (rev. ed. 1947). McIlwain also said: “All constitutional government is by definition limited government.” *Id.*

15. *THE FEDERALIST* No. 51, at 349 (J. Madison) (J. Cooke ed. 1961).

tus. As such, they should no longer remain on the sidelines, taking no action to seek and, one hopes, to find what Kennan calls "ways of escape."¹⁶ The full force of law, feeble though it may be, should be brought to bear upon the growing peril. Law, to be sure, has shortcomings as a principle of social order. It cannot do everything; there are limits to its effectiveness in changing either the attitudes or behavior of people. But that does not mean that the effort should not be made. Chief Justice Earl Warren once remarked that "law floats in a sea of ethics."¹⁷ So it does: law can be a powerful educational force that will create the climate so necessary to move away from the abyss.

A persuasive case can be made for the proposition that nuclear weapons should be considered to be unlawful under both international law and constitutional law. Since law is instrumental, and a reflection of the circumstances in which it exists, the nuclear peril presents it with a challenge and an opportunity. In the United States, the ultimate purpose of law is human survival under conditions that allow human dignity to be maximized. In familiar legal terms, nuclear weapons are a clear and present danger both to survival and especially to achievement of human dignity. Senator J. W. Fulbright, then chairman of the Senate Foreign Relations Committee, stated the point in 1967 in these well-chosen words: The President, he said,

by acquiring the authority to commit the country to war, now exercises something approaching absolute power over the life or death of every American—to say nothing of millions of other people all over the world. . . . No human being or group [is] wise and competent enough to be entrusted with such vast power. Plenary powers in the hand of any man or group threatens all other men with tyranny or disaster.¹⁸

So it does—whether such a power resides in the Kremlin or the White House. The well-known statement of military scientist Karl von Clause-

16. See Kennan, *supra* note 3, at 8.

17. Address by Earl Warren, Chief Justice of the United States Supreme Court at the Louis Marshall Award Dinner of the Jewish Theological Seminary of America in New York City (Nov. 11, 1962).

18. Fried, *War-Exclusive and War-Inclusive Style in International Conduct*, 11 TEX. INT'L L.J. 1, 26 (1976) (quoting from S. REP. NO. 797, 90th Cong., 1st Sess. 1, 26 (1967)).

witz, that “war is diplomacy carried on by other means,”¹⁹ may well have been accurate when made early in the nineteenth century; but it no longer is. Unleashing the atom invalidated it.

Nuclear war cannot by any criterion be “deemed reasonable and right”—to use Justice Frankfurter’s words. Not for the United States. Not for the Soviet Union. Nor for any nation. International law merges with constitutional law to proscribe use of such weapons. Once that is seen, *a fortiori* their manufacture and deployment are also outlawed.

Constitutional Challenges to Nuclear Weapons: The Goals of the Preamble

The purposive—goal-seeking—dimension of constitutionalism suggests this argument: the preamble to the Constitution states the ends of government—“to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.” Nuclear weapons and the delicate balance of terror jeopardize each of those goals; and nuclear war would eradicate them. Surely the framers could not have contemplated such a consequence either for themselves or their posterity.

We are that posterity. The time has come to think seriously about giving substantive content to the preamble. Strictly speaking, to be sure, the preamble is not part of the Constitution. It precedes it. The preamble has never been held to sustain a specific claim of governmental power or of private right. As Justice Joseph Story said in his *Commentaries*, “Its true office is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them.”²⁰ In other words, the preamble sets the tone for the meanings to be given to the specific provisions of the Document of 1787.

Those meanings, first, should be derived from a correct appreciation of present conditions and with the avowed goal of meeting current problems. To quote Chief Justice Marshall’s well-known words in *Mc-*

19. K. VON CLAUSEWITZ, *ON WAR* — (J. Graham trans., F. Maude ed. 1968).

20. J. STORY, *COMMENTARIES ON THE CONSTITUTION* bk. 3, § 462, at 361 (5th ed. 1981) (1st ed. 1833).

Culloch v. Maryland, "The subject is the execution of those great powers on which the welfare of a nation essentially depends. . . . This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various 'crises' of human affairs."²¹ The import of that statement, the most important ever uttered on the theory of constitutional interpretation, is clear: The Constitution may validly be considered to be a tacit delegation of power by the framers to enable succeeding generations of Americans to write their own fundamental law—to meet, that is, the exigencies of *their*—not the framers'—times.

The Constitution was drafted for the benefit of "ourselves and our posterity." Since nuclear weapons threaten the goals of the preamble, the meaning is that there will be no posterity left to pick up the pieces after the bombs have exploded. Not only will the constitutional order have vanished, but quite possibly civilization itself. No one can validly argue that threatening the very existence of "posterity" can be constitutional. Posterity has its claims under the Constitution. That is particularly true because the rapid rate of social change, brought about by the scientific-technological revolution, means that most people alive today will be their own posterity. (Those who ask, "what has posterity done for me?", should constantly keep in mind that they are their own posterity.)

I do not suggest, of course, that in and of itself the preamble can be invoked to persuade anyone that nuclear weapons are unconstitutional per se. However, the preamble does provide an initial entry point into a more detailed and more specific analysis. The implication here is that, as William Seward once said, "there is a higher law than the Constitution"; or as Chief Justice Marshall wrote in *Fletcher v. Peck*,²² Georgia's attempt to revoke a fraudulent land grant disregarded "certain great principles of natural justice."²³ Therefore, Georgia was restrained "either by general principles which are common to our free

21. 17 U.S. (4 Wheat.) 216, 421 (1819). See E. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 2 (A. Chase & C. Ducat 13th ed. 1973) where it states, "the Constitution . . . should be interpreted in the light of present conditions and with a view to meeting present problems."

22. 10 U.S. (6 Cranch) 87 (1810).

23. *Id.* at 133.

institutions, or by the particular provisions of the Constitution.”²⁴ Marshall’s colleague, Justice William Johnson, went even further, asserting that “a general principle, on the reason and nature of things; a principle which will impose laws even on the deity”²⁵ invalidated the attempted rescission. In sum, can a principle of natural justice—a concept that has greater currency in Great Britain—be employed to determine the validity of nuclear weapons? The answer can only be “yes.” In the language of the famous “Martens Clause” of the fourth Hague Convention of 1907, when no treaty provision specifically forbids a new tactic or weapon, combatants and non-combatants remain nonetheless protected by legal principles derived “from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”²⁶

Without going further into the complex question of natural justice, what particular provisions of the Constitution are conceivably relevant to the nuclear weapons situation? I suggest the following, each of which would require creativity or innovation by a constitutional decision-maker. The points are listed as questions requiring exploration, not as established doctrines. Taken together, however, they point in only one direction: the illegality of nuclear weapons.

The Congressional War Power

First: Can Congress delegate, tacitly or expressly, its war-making power? That there has been a tacit delegation to the President admits of no doubt (as Senator Fulbright said). It is even possible to perceive an express delegation in the War Powers Resolution of 1973, enacted into law over President Richard Nixon’s veto, which ironically was intended to place limits over presidential power.²⁷

Presidents beginning with George Washington have unilaterally employed violence. All of those instances, however, save perhaps for

24. *Id.* at 139.

25. *Id.* at 143 (Johnson, J., concurring).

26. 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 309 (L. Friedman ed. 1972); R. FALK, L. MEYROWITZ, & J. SANDERSON, NUCLEAR WEAPONS AND INTERNATIONAL LAW 15 (Occasional Paper No. 10, World Order Studies Program, Center of International Studies, Princeton University (1981)).

27. See Fried, *supra* note 18.

President Abraham Lincoln during the Civil War, were for limited goals. They were taken in accordance with the Principle of the Economy of Means: just enough violence to meet the situation adequately.²⁸ That Principle is simply not applicable in the age of nuclear warfare. By definition, use of nuclear weapons cannot be limited. Once employed, sooner or later the conflict will escalate into all-out war. The meaning for present purposes is that it is one thing for a President to use limited violence, but that it is quite another thing for the Chief Executive to have absolute power of life and death in the nuclear age. Insofar as there is a constitutional doctrine about delegation of legislative powers, certainly it does not extend to the power to threaten civilization itself.

During the Civil War, the Supreme Court in the *Prize Cases*²⁹ sustained Lincoln's actions to meet the emergency: "The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name, and no name given to it by him or them could change the fact."³⁰ (What the Court did not say was that Lincoln made absolutely no attempt to call Congress into session to consider a response to Fort Sumter's hostilities; in fact, he waited almost three months—from April until July—before formally telling Congress what was going on.) The most that can be said for the decision in the *Prize Cases* is that the Supreme Court came close to being an arm of the Executive. That decision, furthermore, at best stands for the proposition that a President can *respond* to emergency situations. By no means does it mean that the President can commence a war. First-strike use of nuclear weapons should, as former high officials Robert McNamara, McGeorge Bundy, Gerard Smith and George Kennan recently argued in *Foreign Affairs*, be dropped as a policy option.³¹

The so-called doctrine of anticipatory self-defense, taken pursuant to Article 51 of the United Nations Charter, was cited by American lawyers during the Cuban missile crisis of 1962 (wrongly, in my judgment). That episode is proof positive about the enormity of Congress

28. For discussion, see A. MILLER, *DEMOCRATIC DICTATORSHIP: THE EMERGENT CONSTITUTION OF CONTROL* (1981).

29. 67 U.S. (2 Black) 635 (1863).

30. *Id.* at 699.

31. McNamara, Bundy, Smith & Kennan, *Nuclear Weapons and the Atlantic Alliance*, 60 *FOREIGN AFF.* 753 (Spring 1982).

allowing one man to have the power to eliminate human life. Clearly, the framers did not want the wealth and blood of the nation to be committed by one person (as *The Federalist No. 69* evidences)—even in a day before the invention of such conventional weapons as the machine gun and the tank! During the 1787 Convention, Elbridge Gerry remarked that he “never expected to hear in a republic a motion to empower the President alone to declare war.”³²

We deal, however, with one of the greatest silences of the Constitution; the principle of constitutional reason of State (*raison d'état*), defined as “the doctrine that whatever is required to insure the survival of the State must be done by the individuals responsible for it, no matter how repugnant such an act may be to them in their private capacity as decent and moral men.”³³ Political officers of American government have never hesitated to employ that principle—to invoke a constitutional silence—both in external and wholly domestic matter, when they believed that conditions warranted. Franz Neumann put it well:

No society in recorded history has ever been able to dispense with political power. This is as true of liberalism as of absolutism, as true of laissez faire as of an interventionist state. No greater disservice has been rendered to political science than the statement that the liberal state was a “weak” state. It was precisely as strong as it needed to be in the circumstances. It acquired substantial colonial empires, waged wars, held down internal disorders, and stabilized itself over long periods of time.³⁴

Neumann surely was correct on the historical record. Said another way, the Constitution has never been a barrier to what those who wield effective control over governmental actions wanted to do.

Circumstances have changed so radically since 1787, and even since the first primitive atom bombs were exploded in 1945, that old practices and old modes of thinking about constitutional propriety must be re-examined. New doctrine must be discovered: The government

32. 2 M. FARRAND: THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318 (1911).

33. C. FRIEDRICH, CONSTITUTIONAL REASON OF STATE 4-5 (1957).

34. F. NEUMANN, THE DEMOCRATIC AND THE AUTHORITARIAN STATE 8 (1957). See Miller, *Reason of State and the Emergent Constitution of Control*, 64 MINN. L. REV. 585 (1980).

must be obliged, as Madison said, to control itself.³⁵

The Bill of Rights was a conscious attempt to resolve the dilemma that *raison d'état* presented to policy-makers. The first ten amendments were inserted for the people's security, to counterbalance extravagant claims of State security. The men who wrote the Bill of Rights were not naive. They knew history and they knew the dark side of man. They opted to make "reasons of freedom and of personal security" explicit, leaving "reason of state" unexpressed. Nuclear warfare means that both personal *and* national security are threatened; neither can long exist while nuclear weapons proliferate. To permit the President alone to have the power to trigger thermonuclear war is contrary both to the letter and the spirit of the Constitution. The failure of Congress to retrieve its war-making authority can no longer be tolerated. In fact, the power to commit the nation to nuclear war is not only presidential; it has actually been delegated to subordinate officers—and on a number of occasions to the vagaries of a computer interpreting radar messages. That is an intolerable situation.

The Congressional Power to Punish Offenses

Second: Can Congress neglect to exercise a delegated power? We have already mentioned the war-making power. Under article I, section 8, clause 10 of the Constitution, Congress has power to punish offenses against "the law of nations." In his famous *Commentaries on American Law*, Chancellor Kent wrote in 1826:

"When the United States ceased to be a part of the British empire, and assumed the character of an independent nation, they became subject to that system of rules which reason, morality, and custom had established among civilized nations of Europe, as their public law. . . . The faithful observance of this law is essential to national character. . . ."³⁶

If, then, it can be shown that international law makes nuclear weaponry illegal, a duty is imposed upon the United States (and other nations) to adhere to that principle.

35. THE FEDERALIST No. 51, at 349 (J. Madison) (J. Cooke ed. 1961).

36. J. KENT, COMMENTARIES ON AMERICAN LAW 1 (1826).

The argument would go like this: Congress having been delegated the power to define and punish offenses against international law, has a duty to carry out that power. In *United States v. Arjona*,³⁷ the Supreme Court said that international law places a duty on every government to prevent a wrong being done within its borders to another nation with which it is at peace, or to the people thereof. That of course is scant legal authority, as lawyers understand authority, to sustain an argument that Congress has a duty to determine the state of international legal norms concerning nuclear warfare and act in pursuance thereof. But the *Arjona* decision does provide a point of entry into a systematic inquiry into the problem. Richard Falk and colleagues have concluded in their monograph *Nuclear Weapons and International Law* that "any threat or contemplated use of nuclear weapons is contrary to the dictates of international law and constitutes a crime of state."³⁸ If that be so, then the duty that American government has, in all of its branches, becomes clear: to take action to help prevent that "crime of state." As the United Nations has repeatedly said, the threat or use of nuclear weapons is a "crime against mankind and civilization."³⁹

The Constitution and International Law

Third: Is international law a part of the corpus of "laws" that the President must faithfully execute (pursuant to Article II of the Constitution)? No one has ever fully explicated the meaning of the word "laws". Usually it is thought of as Congressional statutes. Arguably, however, it has a wider compass. For example, in recent years the Supreme Court has maintained, successfully, that its decisions are the law

37. 120 U.S. 479 (1887). The *Arjona* principle was employed by the Supreme Court to hold that Congress may set up a military commission "as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war." In re Yamashita, 327 U.S. 1, 7 (1946); *Ex parte Quirin*, 317 U.S. 1 (1942). Compare A. REEL, THE CASE OF GENERAL YAMASHITA (1949) with T. TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY (1970).

38. See *supra* note 26, at 60.

39. G.A. Res. 1653, 16 U.N. GAOR Supp. (No. 17) at 4, U.N. Doc. A/5100 (1961).

of the land⁴⁰—thus presenting the question of whether the President has a constitutional duty to faithfully execute them. That question is not only unanswered in constitutional theory; it is little discussed in the scholarly literature. If, however, the Supreme Court is correct in its perception of the thrust of its decisions, then the word “laws” must include more than Congressional enactments. If that is so for the Supreme Court, it requires no large mental jump to say the same for norms of “the law of nations.”

Imposing duties upon the President is such a new concept that very few judicial decisions are apposite. Since *Mississippi v. Johnson*,⁴¹ it was thought that the writ of courts did not run against the Chief Executive. That, however, changed in 1974 when President Nixon was required to relinquish the infamous White House tapes.⁴² Lawsuits against the President have become, if not routine, then certainly not rare.⁴³ (Even so, litigants tend to hale subordinate executive officers into court, rather than the Chief Executive—as, for example, in the *Iranian Hostage Case*.⁴⁴

A concept of constitutional duty is slowly being developed in American constitutional law. Since *Cooper v. Aaron*,⁴⁵ the Justices have maintained that their decisions are “the law of the land.” The Justices have more than an umpire’s function, as Justice William Brennan noted:

Under our system, judges are not mere umpires, but, in their own sphere, lawmakers—a coordinate branch of *government*. While individual cases turn upon controversies between parties, or involve particular prosecutions, court rulings impose official and practical

40. *Cooper v. Aaron*, 358 U.S. 1 (1958).

41. 71 U.S. (4 Wall.) 475 (1866).

42. *United States v. Nixon*, 418 U.S. 683 (1974).

43. *E.g.*, *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974); *Goldwater v. Carter*, 492 F.2d 587 (D.C. Cir. 1979), *vacated and remanded*, 444 U.S. 996 (1979). See generally STAFF OF THE HOUSE COMM. ON THE JUDICIARY, 97th Cong., 1st Sess., REPORT IDENTIFYING COURT PROCEEDINGS AND ACTIONS OF VITAL INTEREST TO THE CONGRESS 11 (Comm. Print 1981).

44. *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (Regan is the current Secretary of the Treasury). See Miller, *Dames & Moore v. Regan: A Political Decision by a Political Court*, 29 U.C.L.A. L. REV. 1104 (1982).

45. 358 U.S. 1 (1958).

consequences upon members of society at large. Moreover, judges bear responsibility for the vitally important task of construing and securing constitutional rights. . . .

The interpretation and application of constitutional and statutory law, while not legislation, is lawmaking, albeit of a kind that is subject to special constraints and informed by unique considerations. Guided and confined by the Constitution and pertinent statutes, judges are obliged to be discerning, to exercise judgment, and to prescribe rules. Indeed, at times judges wield considerable authority to formulate legal policy in designated areas.⁴⁶

My suggestion is that Supreme Court Justices should grasp the nettle and point out to the Executive and the Congress that officials in those branches are charged with a constitutional duty to take action to eliminate threats to the lives, liberties, and properties of the citizenry. Those threats emanate from nuclear weaponry.

The Affirmative Duties of the Federal Government

Fourth: That suggestion of a pervasive governmental duty runs not only to the express provision that the President must faithfully execute the laws but to Congress as well to define and deal with the law of nations and also to the Supreme Court—to make international legal norms judicially cognizable. Of even more importance, a due process question is presented: Does due process of law have a third dimension—in addition to its procedural and substantive aspects—that places affirmative duties upon the federal government?

The answer can only be “yes.” Some Supreme Court decisions point in that direction. In *West Coast Hotel Co. v. Parrish*,⁴⁷ for example, Chief Justice Charles Evans Hughes wrote for the Court that “the liberty safeguarded. . . (by the Constitution) is liberty in a social organization which *requires* the protection of law against the evils which menace the health, safety, morals, and welfare of the people.”⁴⁸ That statement seems to fit the nuclear weapons situation exactly. And in

46. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 595 & n.20 (1980) (Brennan, J., concurring).

47. 300 U.S. 379 (1937).

48. *Id.* at 391 (emphasis added).

Green v. County School Board of Kent,⁴⁹ the court held that local school boards were "charged with the affirmative duty"⁵⁰ to integrate public schools. Professor Thomas Emerson has argued that the first amendment has an affirmative dimension.⁵¹ The point is that American constitutional law should include not only what governments can and cannot do but also, as Duguit said,⁵² what they *must* do if constitutionalism is to survive; and there is precedent for that conclusion.

The argument, in sum, is that the Constitution imposes duties and obligations upon government to control itself—and thus to protect the citizenry. Those obligations run to the American people—the "We, the people . . ." of the preamble. They can be inferred from the Constitution itself, from certain statutes, and from some Supreme Court decisions. The emergent duty that should be recognized is for government officers *not* to take actions that jeopardize the well-being of the populace, or the well-being of "posterity," or indeed, the well-being of peoples of other nations. Nuclear weapons so endanger the lives, liberties, and property of all Americans that they should be considered to be a deprivation contrary to due process.

Conclusion

It would be naive to expect the Supreme Court to intervene in matters such as are discussed above. In general, judges are timorous officers of government. They look upon requests to go beyond the familiar and the expected as "frightful occasions."⁵³ Judges, however, are not the only guardians of the Constitution. Their reluctance should not foreclose a growing dialogue about the constitutionality of nuclear weapons. Constitutional lawyers and political scientists can no longer remain aloof from the ultimate terror. Political means must be invented by which "the world can peacefully settle the issues that throughout

49. 391 U.S. 430 (1968).

50. *Id.* at 437.

51. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795 (1981).

52. *See supra* note 10.

53. *See* J. SHKLAR, *LEGALISM* (1964), particularly at 101-02. *See also* J. STONE, *SOCIAL DIMENSIONS OF LAW AND JUSTICE* (1966).

history it has settled by war.”⁵⁴ That is the challenge that nuclear weapons presents to the constitutional lawyer. No more important task exists.

54. J. SCHELL, *THE FATE OF THE EARTH* 227 (1982).

Protecting Posterity

Aviam Soifer*

Professor Arthur S. Miller, a master of the genre of creative constitutionalism, contributes an impressive example in his article, *Nuclear Weapons and Constitutional Law*. He advances several provocative arguments for possible constitutional limits on United States participation in the nuclear arms race; these arguments, undoubtedly, will stimulate much thought and development—unless a nuclear catastrophe intervenes.

Miller identifies a particular kind of complacency or cynicism among lawyers that allows many of us to assume that nuclear weapons simply are more powerful ways to kill people. It is surely important to challenge this assumption. On a more basic level, the threat of nuclear disaster invites all citizens—not merely lawyers and judges—to consider and to construe the text and meaning of the United States Constitution.

Law unquestionably serves as a secular religion in our democracy¹ and de Tocqueville's recognition that important political issues tend to

* Professor of Law, Boston University School of Law. This sketch is dedicated to my son Raphael Moshe. In one year he already has given his parents much to consider and to hope for the future. I would also like to express gratitude to the W.K. Kellogg Foundation. A Kellogg National Fellowship allowed me time to read and think about the issues explored below.

1. See generally C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 170-88 (1969); M. LERNER, *AMERICA AS A CIVILIZATION* 442-43 (1957); Corwin, *The Constitution as Instrument and as Symbol*, 30 AM. POL. SCI. REV. 1071 (1936); T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 59-71 (1935) and Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934). Of course, much of Arthur S. Miller's impressive output is also directly on point.

As a young man, Abraham Lincoln urged other young men of Springfield, Illinois to let reverence for law "become the political religion of the nation. . . ." R. HOFSTADTER, *THE AMERICAN POLITICAL TRADITION* 103 (1948). Alexis de Tocqueville, writing at the same time, but with a bit less reverence, called law in England and America "an occult science." A. TOCQUEVILLE, *DEMOCRACY IN AMERICA* 287 (P. Bradley ed. 1945).

end up in court is even more accurate today.² Our survival and that of our constitutional faith may depend on our willingness to consider the nexus between constitutional values and protecting our posterity.

In the past, slavery, civil rights and, more recently, abortion were the kinds of issues important enough to provoke many people to supplement the views of lawyers with their own constitutional judgments. To the horror of many of those learned in the law, precedential baggage has sometimes been jettisoned in the process. In trying times, judges and their colleagues sometimes behave more like strict constrictorists than strict constructionists.

Realistically, of course, no one today should entertain the notion that a legal challenge to the United States' role in the spread of nuclear weapons is likely to produce an enthusiastic response from the United States Supreme Court. Yet the threat of nuclear conflagration might be just the type of issue to move citizens to seek connections between constitutional language and contemporary values.

Just as it would be a mistake to leave constitutional values entirely to those with legal training, it would also be unwise to ignore the relevance of constitutional language and structure to such a debate. Plainly, as Chief Justice Taney's *Dred Scott* decision tragically demonstrated,³ there are difficulties and dangers in constitutionalizing debate over public issues. But if the Constitution is relevant to such a debate, attention must be paid.

Miller's article suggests two different kinds of expansive interpretation of constitutional language. The first, more formal type concerns his arguments for the binding nature of international law and for the possible invocation of the non-delegation doctrine, which constitutionally limits the extent to which a branch of government may delegate its powers. Both these lines of analysis involve important legal arguments about the separation of powers in our national government. Miller is a

2. A. TOCQUEVILLE, *supra* note 1, at 290. See also *id.* at 102-09. For an introduction to the voluminous recent literature on the litigiousness of Americans, and our propensity to resort to courtroom battles and judicial orders to resolve all manner of disputes, see J. LIBERMAN, *THE LITIGIOUS SOCIETY* (1981); Manning, *Hyperlexis: Our National Disease*, 71 NW. U.L. REV. 767 (1977).

3. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). For a general discussion of this case, its context and its consequences, see D. FEHRENBACHER, *THE DRED SCOTT CASE* (1978).

leading constitutional law expert on this topic; his thoughts on the subject are surely worthy of consideration. I leave it to others to debate how convincing Miller's specific arguments are.

What interests me more is Miller's second category of argument. Here he suggests that the phrase in the Preamble to the United States Constitution that concerns securing "the Blessing of Liberty to ourselves and our Posterity" may be a meaningful—perhaps even a legally enforceable — concept.

That the Preamble expresses a common theme is underscored when one considers the context in which early state constitutions as well as the federal document were composed and ratified. Those who precipitated a Revolutionary War and established a nation on an innovative constitutional scaffolding intended federal and state governments to provide for and protect not only themselves, but the generations to follow. The influential Virginia Declaration of Rights of 1776, for example, began with the following brave proclamation about equality and the rights of men:

1. That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, *they cannot, by any compact, deprive or divest their posterity*; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing *and obtaining happiness and safety*.⁴

A Republican government was formed to secure the happiness and safety of the founders *and of their posterity*. As Thomas Jefferson argued, the living hold the earth in usufruct for future generations.⁵ Each

4. 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 49 (W. Swindler ed. 1979) (emphasis added). Virginia retains this language as Article I of her Bill of Rights.

5. Jefferson's assertion "that the earth belongs in usufruct to the living" appears in his letter to James Madison, written September 6, 1789 but not mailed until January 9, 1790. That letter, and the exchange it provoked between Madison and Jefferson, is discussed in illuminating fashion in A. KOCH, JEFFERSON AND MADISON 62-96 (1950). See also D. MALONE, JEFFERSON AND THE RIGHTS OF MAN 179, 291 (1951). Jefferson was sufficiently serious about the obligations of those living to those to follow that he proposed specific legal constraints to guard against waste and other violations of the natural law duty he believed to be owed by the present generation.

generation is morally bound to preserve the inheritance of those to follow. This concept of a responsibility to preserve the earth for the future was a central tenet in the consciousness and the constitution-making of the period. It does not take too much stretching across the intervening two hundred years to see how the early hope and effort of the founders to preserve and protect their political experiment for posterity is relevant to the threat of nuclear catastrophe today. Provoked in a positive sense by Miller's analysis, I now turn to an exploration of that idea, which I will call constitutional protection of posterity. My discussion is divided into three categories: Preamble, Protection, and Posterity.

Preamble

What legal weight should be accorded the Preamble to the Constitution? This question has seldom been explored in American constitutional law.⁶ Like motherhood, the flag, and the Declaration of Independence, the Preamble is honored more by invocation than by observance. The language of the Preamble is generally relegated to misty patriotic incantations — appropriate for introductions at political gatherings and the socialization of immigrants, schoolchildren and the like, but not for the hardheaded business of those trained in the law. But when debate about constitutional text becomes particularly heated and spills out into the streets, as it did in the context of antislavery agitation prior to the Civil War, for example, citizens-in-the-street often begin to proclaim in plain language their understanding of the Preamble.⁷ Indeed, this tendency helps to explain why the Preamble figures so infrequently in the constitutional discourse of judges, lawyers and legal scholars. If the public may parse the Preamble, it begins to appear hopelessly and dangerously open-ended.

The clear possibility of imminent nuclear danger is the appropriate occasion for reconsideration of what constitutional weight the Preamble should bear. A full exploration of the issue must await more time and

6. A suggestive recent exception appears in Black, *A Round Trip to Eire: Two Books on the Irish Constitution*, Book Review, 91 YALE L.J. 391 (1981) Black's argument concerning application of the Ninth Amendment clearly relates to, and reinforces, the themes sketched in this essay.

7. See, e.g., W. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848* (1977) and my review at 56 TEX. L. REV. 1319 (1978).

space; however, Miller makes a significant start. Yet Miller may have dismissed the legal importance of the Preamble a bit too quickly; he also seems not to have weighed adequately the possibility of internally inconsistent commands within the Preamble itself. Miller points to the textual provision about securing the blessings of liberty not merely for ourselves, but also for our posterity. He then quickly moves to a discussion of the concept of natural justice. Thus Miller does not wrestle with other language in the Preamble that commits our government “to provide for the common defence” and to “insure domestic Tranquility.” Those who would expand or maintain our nuclear arsenal could certainly argue that the task they have set for themselves is to carry out those directives.

The possibility that both sides might invoke the Preamble in a constitutional argument about nuclear weapons does not make it irrelevant. Internal contradiction in the constitutional text is neither as silly nor as strange as it might first appear. Indeed, the phenomenon of conflicting claims, all premised on constitutional language, is a frequent, even prevalent mode of constitutional law argument. The possibility that the Constitution itself contains inconsistent commands and conflicting rights and obligations is an idea not yet adequately explored.⁸ A reading of our constitutional history compels recognition of just such problematic interpretations. It also forces those would construe the Constitution’s language to consider the structure as well as the words of the document.

In many ways, the Preamble is the obvious place to begin. Its clear indication of transgenerational concern should not be ignored. At a minimum, the Preamble suggests that constitutional meaning should be derived with an eye to the future as well as to the past. Brief consideration of both the specific language and the structure of the Constitution, as they pertain to the obligation of government to protect the populace, illustrates my point that the Preamble suggests the Constitution should be discussed as if posterity were eavesdropping.

8. For useful initial forays, see generally Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022 (1978) and C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* (1969).

Protection

Miller provides a summary of a few recent and controversial decisions by the United States Supreme Court which, taken together, suggest an ill-defined constitutional right to privacy and autonomy. Such a constitutional right, now generally conceded to be a right derived from a revised or revisited idea of substantive due process,⁹ could conceivably be extended dramatically to encompass the family of man.

Such a concept of family exceeds the grand old American nuclear family and even the extended family, whose vital role in the American past was essential to the Court's decision in *Moore v. City of East Cleveland*.¹⁰ It is too grandiose a gambit, however, to leap from the Court's groping efforts to define some right to intimate associations¹¹ to a claim of constitutional constraints that may be invoked to promote group survival.

This jump is troublesome for several reasons. First, most of the Court's recent decisions are premised on a highly individualistic notion of procreative and familial roles. Additionally, the "bad press" that protection of intimate relationships received from the public as well as from constitutional experts soon after its discovery by the Supreme Court makes this particular constitutional claim a somewhat shaky platform upon which to construct an edifice for constitutional protections.

Finally, it is somewhat anomalous to premise an argument advocating constitutional concern for future generations on decisions that are particularly troublesome precisely because, in invalidating state barriers to abortions, the Supreme Court appeared to ignore the future-oriented claim that could be made on behalf of fetuses. This claim implies that the fetus, more than the pregnant woman, is a direct link to future generations; it alleges that the state, as surrogate for and protector of the fetus, best represents posterity.

Needless to say, the nexus between the fetus and the future has

9. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 502-04 (1977); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

10. 431 U.S. 494, 503-06 (1977).

11. The most thoughtful effort generally to accept and to develop the implications of the new privacy may be found in Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

not been a central element of the debate swirling around abortion. But such a connection might be a way to rethink, perhaps even to begin to justify, some of the curious judicial line-drawing in the abortion decisions, even as it suggests new difficulties in *Roe v. Wade*¹² and its misnamed “progeny.”

The “privileges or immunities” clause of the Fourteenth Amendment, though not mentioned by Miller, is perhaps more promising, in part, because the meaning of that clause has scarcely ever been explored. The United States Supreme Court vitiated any discernible original intent behind its words in the *Slaughter-House Cases*,¹³ which narrowed this protection of the rights of citizens to redundancy and oblivion. But the reasons for disuse of the privileges or immunities clause since that 1873 decision go beyond the burden of distinguishing, overruling or ignoring the Court’s dubious initial interpretation. They include the apparent limitation of the phrase to the protection of “citizens” and not — as with other fourteenth amendment protections — protection of all persons. Existing judicial constructions of the seemingly parallel privileges and immunities provision in Article IV of the United States Constitution also complicate new interpretations of the fourteenth amendment language. In recent years, however, a surprising number of constitutional scholars of divergent ideologies have suggested that the hour for privileges or immunities protection has come round at last.¹⁴

12. 410 U.S. 113 (1973).

13. 83 U.S. (16 Wall.) 36 (1873).

14. See, e.g., Kurland, *The Privileges or Immunities Clause: 'Its Hour Come Round at Last,'* 1972 WASH. U.L.Q. 405; J. ELY, *DEMOCRACY AND DISTRUST* 22-30, 98 (1980). It may be worth noting that Professor Kurland’s literary reference is to William Butler Yeats’s poem, *The Second Coming*, in which Yeats appears not entirely sanguine about that vision. In fact, the poem may be read as somewhat prophetic on the subject of nuclear annihilation. Perhaps Yeats suggests something emerging from the apocalypse, but he writes of a time when

Things fall apart; the centre cannot hold;
Mere anarchy is loosed upon the world,
The blood-dimmed tide is loosed, and everywhere
The ceremony of innocence is drowned;
The best lack all conviction, while the worst
Are full of passionate intensity.

W.B. YEATS, *The Second Coming*, THE COLLECTED POEMS OF W.B. YEATS 184 (De-

Although the idea that all citizens should share in the constitutional privileges or immunities enjoyed by each citizen is provocative in itself, it is even more so when future citizens are included in the constitutional equation. Yet the Fourteenth Amendment privileges or immunities clause was derived most immediately from the 1866 Civil Rights Act. It is relatively clear that the men of the 39th Congress sought to mandate government protection from grievous harms and to guarantee rights they deemed essential to security.¹⁵ The notion that privileges or immunities has something to do with freedom to choose the means of individual survival, as well as the assurance of minimal personal and group security, merits further attention.

Even more promising, I believe, is the argument that the constitutional text and structure combine to impose a duty on government to guarantee a certain threshold of security to all citizens. This interpretation, while connected to what I suggested about the Preamble, relies primarily upon the package of constitutional amendments ratified in the wake of the Civil War. Elsewhere, I have sought to demonstrate that the framers of the Thirteenth, Fourteenth and Fifteenth Amendments intended to alter existing notions of federalism and to guarantee a range of basic individual rights.¹⁶ They sought to narrow or to eliminate the gap — starkly illustrated for most of them by constitutional protection of slavery — between what they deemed to be natural rights not previously protected, and what the federal Constitution now should and could protect.

Those who wrote, passed, and ratified this second Constitution

finitive ed. 1956). A "rough beast," with "gaze blank and pitiless as the sun," now "Slouches toward Bethlelem to be born." After "twenty centuries of stony sleep . . . vexed to nightmare by a rocking cradle," it is this rough beast's hour which is now "come round at last." *Id.*

15. For an elaboration of this theme, and its historical context, see Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. Rev. 651 (1979); see also Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 MICH. L. REV. 462 (1982). Raoul Berger's rather vehement response to my article is in, *Soifer to the Rescue of History*, 32 S.C.L. REV. 427 (1981). For another recent statement of a viewpoint opposed to my own, see *dictum* concerning the negative Constitution in *Bowers v. DeVito*, 51 U.S.L.W. 2163 (7th Cir. Aug. 20, 1982) (Posner, J.).

16. Soifer, *supra* note 15, at 686-96, 700-06.

hoped that state governments would adequately protect the civil and political rights the federal Constitution now established. By constitutional amendment and by statute, they attempted to assure federal protection in the event that the states failed in their duty to guarantee these newly-recognized rights. To those who sought to constitutionalize the outcome of the Civil War, it was clear that allegiance to government compelled a reciprocal governmental duty to protect basic rights. As they articulated the promise of the second Constitution, they repeatedly included the safety and security of all inhabitants. If the states failed in their obligation to protect those within their borders, it was the federal government's duty to intervene to secure the basic rights of all.

Too frequently, the lawyer's stock-in-trade is a tendency to focus on a single word or phrase to construe a constitutional text. This technique often misses the central message of the constitutional medium. Charles Black made this point convincingly years ago, and it has been developed by several others since.¹⁷ A single example, derived from the Fourteenth Amendment, will illustrate.

In recent years, and for very good reasons, we have devoted primary attention to the "equal" part of "equal protection." Many struggled valiantly, and struggle still, to determine when racial stereotypes and their ilk should be constitutionally forbidden. In this process, the "protection" element of the constitutional text often is ignored. A few scholars have begun to develop the theme of constitutional protection for rights or processes they regard as fundamental, such as the right to political participation and minimal social welfare.¹⁸ Thus far, however, equality remains the dominant motif, and protection is seldom identified as an overarching problem.

I do not mean to suggest that protection is a self-explanatory term, nor that an inquiry about the concept will yield easy answers. Elsewhere I have begun to consider the two-edged nature of arguments about governmental duty to protect. The concept includes both the pos-

17. C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969); Ely, *supra* note 9, at 73-104; Monaghan, *Of 'Liberty' and 'Property,'* 62 *CORNELL L. REV.* 405 (1977).

18. See Ely, *supra* note 9 (equality in the political process); Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 *HARV. L. REV.* 7 (1969) (threshold of necessities).

sibility of paternalism, in a pejorative sense, and of parentalism, a more positive counterpart.¹⁹ It can be demonstrated, I believe, that those who wrote and adopted both the initial Constitution and the constitutional innovations after the Civil War operated in contexts that encouraged them to envision something of each kind of protection, without distinguishing clearly between the two.

A right to basic protection can be turned on its head, of course, by those who assert that foreign domination constitutes the vital threat to American security. Even this claim does not easily or convincingly extend to a defense of nuclear weapons proliferation, however. The assertion that in protecting something, we must set in motion the means to destroy it, is familiar enough after Vietnam. By now, such familiarity should breed contempt, not nuclear arms.

My claim is that the threat of nuclear annihilation—like a board bashed across the muzzle of a mule—should be sufficient to get our attention. We may then begin to consider exactly what kinds of obligation to the population we consider essential to the constitutive core of our republican form of government. We will have to confront the vexing issue of how to include posterity in our own generation's calculations.

Posterity

To begin to grapple with the issue of how to deal with our issue, we must wrestle anew with a perplexing philosophic and practical problem, and with a dilemma that deeply concerned eminent American thinkers such as Thomas Jefferson and James Madison. Even to define posterity is a challenge, as Jefferson discovered when he set out to calculate the lifespan of a generation. He tried to use his generational concept to create a legal system to assure that the earth would belong to the living and their posterity, rather than be ruled by the dead hand of the past. Precision about generations was and remains terribly elusive, however. Therefore, Jefferson's more pragmatic friend, James Madison, argued that "the present generation is morally bound to respect the natural rights — the basic needs — of coming generations, however much positive laws in any given society may depart from the

19. N.Y. Times, Oct. 19, 1981, at B10, col. 6.

moral ideal.”²⁰

Concern for future generations was an integral part of constitution-making in the nation’s formative years. Koch summarized her discussion of the exchange between Jefferson and Madison as follows: “In general, the fundamental features of the theory that proved acceptable to both Jefferson and Madison were forward-looking and generous in their regard for the liberty and welfare of generations to come in America.”²¹

The difficulty of determining exactly what this concern entails remains with us. Neither rights theorists nor utilitarians have met the challenge yet. The nearly total absence of posterity in the calculus done within the school of law and economics is one of the most striking limitations of this new orthodoxy.²² The challenge of somehow acknowledging and providing for the future is vital, however, and starkly presented through intensified awareness of nuclear terror.

Most judicial analysis employs present presumptions and fact-finding to determine something concrete about the past and to serve a remedial or punitive end. But in constitutional law, the perspective is more often both forward and backward looking. One can lose all sense of balance, of course, in such Janus-like contortions. Yet even self-proclaimed strict constructionists usually acknowledge that the Constitution is a document designed for the future, meant to create a structure for an ongoing Great Experiment. As Chief Justice John Marshall put it, the Constitution was “intended to endure for ages to come.”²³

Failure to heed this future-oriented aspect of American constitutionalism is commonplace. It is particularly glaring, for example, in the

20. Koch, *supra* note 5, at 74.

21. *Id.*

22. For philosophic discussions about possible claims upon contemporaries by those to follow, see, e.g., *OBLIGATIONS TO FUTURE GENERATIONS* (R. Sikora and B. Barry eds. 1978); Kavka, *The Paradox of Future Individuals*, 11 *PHIL. & PUB. AFF.* 93 (1981) and Parfit, *Future Generations: Future Problems*, 11 *PHIL. & PUB. AFF.* 113; B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).

The best critical discussion I know about the generational problem in the context of the law and economics debate is found in Heller, *The Importance of Narrative Decision-Making: The Limitations of Legal Economics as a Basis for a Liberal Jurisprudence—As Illustrated by the Regulation of Vacation Home Development*, 1976 *WIS. L. REV.* 385, 459-68.

23. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

recent efforts by the Supreme Court to make proof of past discriminatory racial motivation a necessary precondition before courts may recognize violations of rights guaranteed by the Civil War Amendments. This generally serves, as a practical matter, to constitutionalize the *status quo*.²⁴ It appears to reject the vital combination of symbolic and pragmatic roles the Court often played in the past.

Virtually anything that exists is said to be legitimate under this approach. Existence is viewed as a race of life, which the Court deems to be a fair contest. The nuclear arms race may be perceived in much the same way. Legal protection can be invoked only upon a clear showing of overt, official and effective mistreatment. Victimization alone, even racial victimization, is not sufficient. Exceptions will be made only for those who can actually prove bad motive.

Since the central defense of the expansion of nuclear arms is defense — not only a proper motive, but even an admirable one — an actual constitutional claim that nuclear proliferation endangers rather than enhances the security of ourselves and our posterity appears doomed. If it ever got that far, the current Court would easily dismiss the argument as simply a matter of the claimants' perception of the problem.²⁵

Such a response—the idea that any actual harm is simply a matter of one's own subjective perception — is a paraphrase of the way the Court answered the argument in *Plessy v. Ferguson*²⁶ that to require segregated streetcars was a denial of constitutional rights. Like racial stigma, the danger of nuclear conflagration can be passed over as some-

24. For an initial stab at this theme, see Soifer, *Complacency and Constitutional Law*, 42 OHIO ST. L.J. 383 (1981). See also Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

25. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978).

26. 163 U.S. 537 (1896). A disturbing echo of the reasoning in *Plessy* may be found in *City of Memphis v. Greene*, 451 U.S. 100 (1981), *reh'g denied*, 452 U.S. 955 (1981). Here, too, the United States Supreme Court seemed to believe that any stigma associated with blocking off a street where it traversed a black neighborhood, as it ran from a prosperous white neighborhood to a public park, was to be found only in the perception of the black plaintiffs. After all, Justice Stevens argued, the blacks who complained did not show that blacks ever sought to have streets blocked, only to be refused. Any disparate impact "could not, in any event, be fairly characterized as a badge or incident of slavery." *Id.* at 126.

thing merely in the eyes of the beholder. This is particularly true today, when the Social Darwinian notion of independent individuals freely choosing their own fate again dominates judicial interpretation of constitutional law. Only if we begin to explore and to heed the constitutional directive to protect our posterity, and begin to include future generations in our own constitutional calibrations, can we hope to make certain that the dreaded dead hand of the past does not clasp a future universe full of dead hands.

Exactly where greater recognition of the claims of posterity would lead constitutional law is unclear. It is uncommonly important, though, to consider the organic, direct connection of our founders to subsequent constitutionalists — including ourselves. In turn, we are inevitably the parents and preservers of our posterity. This continuity, and the goal of protecting posterity established in the constitutional framework, suggest that it is neither far-fetched nor unproductive to explore how constitutional values are relevant to the contemporary threat of immediate nuclear annihilation.

Conclusion

The practical visionaries of the past surely could not have anticipated our modern folly. Yet themes of optimistic anticipation and concern for future generations echo through the constitutional scheme they established. The words of 1787 and 1868 provide no crisp, clean answers to any cases and controversies that might be framed to challenge the spread of nuclear weapons. But they do bequeath a still, small call to reason and to hope — for ourselves and for our posterity.

Nuclear War: The End of Law

Milner S. Ball*

Professor Miller summons us to consider the constitutionality of nuclear weapons. In doing so, he has made an original, provocative contribution to constitutional jurisprudence as well as the humanizing politics of nuclear arms control. He speaks with scholarly responsibility on a subject that has heretofore engendered either silence or nonsense and bombast.

Introduction

By raising the question about the constitutionality of nuclear weapons, Professor Miller augments understanding of constitutional law and how constitutional law is done. Constitutional lawyers take far too crabbed a view of their subject when they merely sift through past court decisions and speculate on how the Supreme Court might decide a case in future. Consideration of the legality of nuclear arms leads Professor Miller to point out that the constitution is not limited to what the Court has said or may say. It includes, he reminds us, the great political realities which are brought partially to textual expression in the preamble and which can be fully satisfied not by judicial opinions but only by the people's decisions and actions and by the operations of all our institutions. To begin with, then, nuclear war violates constitutional law in the Miller dimension, which embraces systemic justice and the fundamental nature of government by the people.¹

Equally enlarging is Professor Miller's introduction of arguments drawn from specific constitutional provisions. First he exhumes and gives life to the doctrine of delegation, not presently favored in federal

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1. It is to be remembered that Abraham Lincoln characteristically referred to the Declaration of Independence rather than to the Constitution when he addressed the fundamental nature of the American people.

litigation and not before given such expansive, refreshing expression.² Article 1, section 8, clause 2 commits to Congress the power to declare war. Presidents, acting without such congressional declarations have, from time to time, authorized responsive, limited military action. Professor Miller proposes that, because limits cannot be maintained once nuclear weapons are employed, Congress may not delegate decisions about their use to the President or to computers and glitches.³

Second, having called attention to the restrictions of delegation, Professor Miller takes note of its responsibilities. Congress may not fail to exercise the powers delegated to it by the constitution. Article I, section 8, clause 10 grants to Congress the power to punish offenses against the law of nations. Accordingly, says Professor Miller, Congress must combat the international crime of threatened or contemplated use of nuclear weapons.⁴

Third, the President has an affirmative constitutional duty similar to that imposed upon Congress. Article II, section 3 directs the chief executive to "take care that the laws be faithfully executed." The word "laws" comprehends international law by implication, analogy or necessity, and so places the President under a duty matching that of Congress. He, too, must act to remove the forbidden threat of nuclear

2. Pre-1937 decisions of the Supreme Court occasionally relied upon the doctrine of non-delegation of legislative powers in striking down actions of Congress. *See, e.g., A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935). More recently, the Court has avoided invocation of the doctrine by the device of narrow construction of a tested delegation. *See, e.g., Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976). For a judicial expression of interest in resurrecting the doctrine see *Industrial Union v. American Petroleum Inst.*, 448 U.S. 607 (1980). The doctrine of non-delegation has found a readier audience in state courts where it appears to be alive and well. *See, e.g., Howell v. State*, 238 Ga. 95, 230 S.E.2d 853 (1976).

3. There is a prior question here about whether Congress itself has the power to declare nuclear war. *See infra* p. 61. If war ever had a human scale, that possibility has grown increasingly remote since the beginning of World War I when technology was let loose relentlessly to grind human life and human flesh.

4. I have reservations about this argument. It may be that legislatures are designed, mercifully, exactly to do nothing. *See, e.g., R. NEELY, HOW COURTS GOVERN AMERICA* 47-78 (1981). Perhaps the only affirmative duty of Congress that we may safely press is that of the oath of office to support the Constitution (art. VI, § 3). To cite but one example, I think it best that the congressional power to declare war not be viewed as carrying with it an affirmative duty. We want no zealous exercises of that power.

arms.⁵

Last, Professor Miller argues that the due process clause places upon all three branches the requirement actively to prevent nuclear deprivation of life, liberty and property.⁶ He then ends as he began: he challenges lawyers to take up the problem of nuclear weapons because it is a matter of law for lawyers, not some distant activity above and beyond the calling of the bar.

The Constitutional Aspects of Nuclear Weapons

If my views diverge from Professor Miller's at certain points, the variance should not be misinterpreted. I wish to pay tribute to him and to do so by heeding his call to speak. How better to express thanks than to do exactly as he urges and take up the debate?

Professor Miller offers his essay as a preliminary exploration of possibilities. My response is in kind. I want to raise some questions about the agenda for discussion of the constitutionality of nuclear weapons.

5. This argument has several steps. There must be an affirmative duty; international law must be included in this duty; nuclear weapons must be a violation of international law; the Court must have power to declare the duty. I do not think the argument unworthy of pursuit. But each of its elements will have to be established, and I do not think that an easy task.

6. Such a federal police power might be seen as having two components: an affirmative duty abroad to labor for mutual disarmament and a domestic self-policing duty not to do those things which may trigger nuclear war.

Perhaps the growing interest in an expansion of the public trust doctrine might afford a preferred ground upon which to build the desired affirmative duty.

It is also to be asked if the affirmative duty of government might not include some form of unilateral disarmament. Professor Miller says that his essay is not a plea for selective unilateral disarmament. I would like at least to reserve judgment on the issue of unilateral disarmament. On the one hand, I can imagine a type of selective unilateral disarmament that might be plain, good military policy and actually strengthen our defense posture. On the other hand, as Professor Miller points out, ideas may appear foolish only because they are new and challenge received ways of thinking. Miller, *Nuclear Weapons and Constitutional Law*, 7 NOVA L.J. 21 (1982).

A. Unconstitutional: Is the Characterization of Nuclear Weapons as Constitutional Adequate?

Fear and befuddlement prevent action. If we are so afraid of the bomb that we suffer ethical paralysis or are so overwhelmed by the claimed complexities of disarmament that we cannot grasp them, then the arms race will run on toward the finish of nuclear apocalypse. Professor Miller cuts the dragon down to size. He gives us hope. He shows us that we can take action, can process the dragon into links of sausage. This is a very lawyerlike approach. It encourages lawyers to understand that nuclear war is something that they can and should prevent. We are enabled to subject the bomb to arguments about constitutional validity the way lawyers reduce any volatile issue to manageable parts bearing blackletter labels.

This is a good and commendable undertaking. Nevertheless there is considerable risk in initiating a dialogue about the legality of nuclear arms. Lawyers suffer a vocational disadvantage in this regard not shared by their colleagues in the medical profession. When a physician describes the effects of a nuclear attack — massive death, mutilated bodies, unbearable suffering, endless contamination — we are horror struck.⁷ None but a madman would argue that nuclear war is healthy.

7. Physicians are as diverse in their political and social views as any other large group of citizens and rarely speak in unison on matters of public policy. But today they are virtually united in their effort to convey a simple, urgent message about nuclear war to the American public and the Administration. The message is this: Nuclear war—any kind of nuclear war—would cause death and suffering on a scale never seen before in all of history, and modern medicine with all its skills could do little or nothing to help. . . .

Most physicians are convinced that nuclear war is the greatest threat to health and survival that society has ever faced. It would indeed be the 'final epidemic,' for which medicine has no treatment. When there exists no cure for a disease, the only course is to take preventive measures. That is why physicians believe it is their professional responsibility to urge their fellow citizens and their Government to make certain that nuclear weapons are never used. Unlike natural catastrophes, over which man has no control, nuclear war would be a disaster of man's making. It should be preventable.

Realm & Leaf, *Doctors: No Rx's In a War*, N.Y. Times, Aug. 11, 1982, at A23, col. 1.

Not so when our political rather than physical constitution is the subject. No sooner does one lawyer argue that nuclear weapons are not constitutional than another lawyer ventures the counter-argument that they are constitutional.⁸ Arguments on both sides of *any* issue are our professional stock-in-trade. To introduce the subject of nuclear weapons into such argumentation is to take the chance that this exercise may, against our deepest wishes, lend nuclear weapons an unwarranted air of legitimacy.⁹ Quite apart from any authoritative decision, lawyers' arguments might domesticate the nuclear issue, remove its urgency as well as its terror, and make it, catastrophically, familiar.

Nuclear weapons are monstrous. They may also be illegal. But we dare not lose sight of their unnatural monstrosity. Of course lawyers should address prevention of nuclear war. The assignment is to keep the blasphemy of nuclear war clearly in focus at the same time that we find means for lawyers to reckon with it in lawyerlike ways.

Instead of talking about the unconstitutionality of nuclear weapons, would we not be better advised to describe them as deconstitution-alizing or anti-constitutional?

Professor Miller's own comments — about nuclear war's destruction of underlying values — indicate how we might proceed. Like doctors we would attempt to depict the aftermath of nuclear war. But,

8. The arguments in favor of constitutionality are easily imaginable: preambular citation of the need for common defense, Article I delegation of the powers to raise and support armies and to provide for the common defense, Article II delegation of certain foreign affairs responsibilities and of command of the armed forces, Articles III limitations of judicial review, etc.

9. Undeniably, nuclear weapons exist. But that certainly does not mean that they are legitimate. Professor Miller refers to an "assumption of constitutionality" of nuclear weapons. Miller, *supra* note 6, at 22. I am not prepared to make or grant that assumption.

Secretary of Energy, James B. Edwards, not only assumes the legitimacy of nuclear weapons but celebrates them. In an unparalleled display of callousness—or was it cynicism?—Secretary Edwards said that he found "exciting" a nuclear bomb exploded on the eve of the anniversary of the bombing of Hiroshima. "*Cabinet Officer says U.S. will continue Atom Arms Testing.*" N.Y. Times, Aug. 6, 1982, at 1, col. 1. Secretary Edwards seems to regard nuclear arms as an adjunct of the first amendment: the nuclear bomb "is the weapon that can preserve their ability for free political discussion." *Id.* at B4, col. 6. It is an alarming point of view and helps to indicate why I wish to overthrow the ideological statement that we live in a Hobbesian world. See *infra* note 10.

instead of taking up the medical consequences, we would address the legal consequences.

For example: What would become of western legal order? Would there be a legal system? How would it function? Would there be government? Would there be courts? What of police? What would happen to the practice of law? Would there be law schools left? What would legal education become when all the major law schools in major urban target areas had been destroyed? And what of democratic government? Is it not likely that any surviving remnant would find abhorrent and reject our way of life and Constitution that had permitted this thing to happen?¹⁰

These are the kinds of questions that might be taken up and debated if we realized that nuclear weapons are de-constitutionalizing. We would be asked to portray those things known to us as lawyers that would be lost. Lawyerly argument would then be stripped of its potential to legitimate nuclear weapons for the arguments would proceed from the premise of destruction. The subject for debate would be not whether nuclear weapons are legal, but rather, the extent to which they destroy law and lawyers.

10. Professor Miller says that we live in a Hobbesian world. Miller, *supra* note 6, at 24. I disagree for two reasons. First, a Hobbesian world is what we would have *after* nuclear war. Hobbes' account is sobering:

In such condition, there is no place for industry; because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving, and removing, such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish and short.

T. HOBBS, *LEVIATHAN* 100 (M. Oakeshott ed. 1962). That is a pretty fair description of a post-nuclear war world, not the one we have now, and it serves to help us understand what we would lose.

The second reason for disagreeing with the statement that we live in a Hobbesian world is this: We are made to believe that we live in a Hobbesian world through propaganda and ideology, and it is a kind of self-fulfilling prophecy. We need desperately to find a more satisfactory description for reality, one that would not lead us to accept as rational the self-contradictory statement that we must have nuclear arms if we are to survive.

B. Decision-Makers: The Nuclear Problem as an Opportunity for Popular Revolution.

Professor Miller, with his strategy of hope, points out that nuclear weapons present us with an opportunity. He makes of them an opportunity for broadening and deepening our conception of constitutional jurisprudence and for heightening our sense of legal ethics. May there not be another opportunity in the making, opportunity for a kind of positive democratic revolution?

Thomas Jefferson had thought that liberty in America might be enriched by a revolution every generation. Nuclear arms may provide occasion for this generation's revolution if the growing disarmament movement among the people continues.¹¹

Professor Miller makes reference to those who have authority and control in the government and their duty to take action. And he says that lawyers are no longer on the sidelines because they have quasi-governmental status and a share in the action. This is to accept the fact of government by an elite and to say that lawyers have some attachment to that elite.

The problem of truly popular government is one that we have not solved. We have done a more or less satisfactory job of providing government of and for the people. We do not provide government by the people. Periodic elections, polls and interest groups are means of bringing influence to bear upon government. They are not a participation in government. The nearest thing the people have to a place within government is the street — marches and rallies before the United Nations, below the Washington monument, etc. The street is not a satisfactory forum for the formation and expression of opinion.

It is in this sense that nuclear weapons and the people's movement to control them offers a governmental opportunity, the opportunity to think about and explore government by the people.

President Eisenhower pointed to the gap between what the government is planning and doing and what the people are dreaming and hoping. He said that the people want peace so much that one day govern-

11. Letter from Thomas Jefferson to W. S. Smith (Nov. 13, 1787) in *THE PAPERS OF THOMAS JEFFERSON* 356-57 (J. Boyd ed. 1955). See also *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 488, 492, 674-75, 714 (A. Koch & W. Peden eds. 1944).

ments “had better get out of their way and let them have it.”¹² We keep reciting the refrain that in this government the people are sovereign. If the people are indeed the governors as well as the governed, then they and not an elite should be the decision-makers with the duty to act. Perhaps the issue of nuclear arms control will bring the day for piercing the veil of rhetoric and reaching the reality of popular government. At least we are given the opportunity to consider it.

Lawyers have a critical role to play in the democratic governing of affairs, especially nuclear affairs.¹³ They have this role not because of ties to a governing elite but because of their original ties to the people. If we have governmental status with responsibility to act, then this is so because as officers of the court we have a singular duty in generally-shared citizenship.

With respect to the nuclear disarmament opportunity, lawyers might wish to reflect upon and develop juridical means for giving expression to what the people are dreaming and hoping. We might also wish to consider whether conceptions of how to train lawyers in the skills of representation have been too narrowly confined. Legal representation of the people may entail something altogether different from (and in addition to) courtroom advocacy, negotiation, drafting, etc. Would this be subject matter for a professional skills course? Constitutional law? Some other? As a minimum, lawyers ought to be asked to devise, for a matter as urgent and immediate as nuclear war, a more efficacious mode of participation than polls, litigation, demonstrations, or a letter to one’s congressman. (The force of such a letter is fully spent in triggering a machine-extruded standard-form response bearing a machine-impressed signature.)

C. Process: Are the Procedures Leading Up To and Resulting From Nuclear War Constitutional?

Professor Miller observes that constitutionalism in the United

12. D. EISENHOWER, *THE QUOTABLE DWIGHT D. EISENHOWER* 55 (1967); B. COOK, *THE DECLASSIFIED EISENHOWER* 149 (1981) (quoting a statement of Eisenhower to Harold Macmillan in a televised talk, London (Sept. 6, 1959)).

13. I am a member of the Lawyer’s Alliance for Nuclear Arms Control. I do not represent or speak for this organization. My opinions led me to join this group; my membership did not lead me to hold these opinions.

States is more than process, i.e. law has normative content. This may well be true. But are there not procedural issues yet to be fully exploited?

(1) If we project the aftermath of a hypothetical nuclear war (assuming there would be an aftermath), the barren legal landscape exhibits several procedural features. One of these is the absence of appeal or recourse.

In *Nixon v. Fitzgerald*,¹⁴ the Supreme Court held that the President is absolutely immune from damage suits for actions taken in connection with official duty. Writing for the Court, Justice Powell averred that the Court had not placed the President above the law.¹⁵ He said that the possibility that the President was above the law was a chilling but unjustified contention.¹⁶ He said that it was unjustified because there remains the remedy of impeachment.¹⁷ Regardless of what one thinks about *Nixon v. Fitzgerald*, it does help us to see the chilling fact that nuclear war would put the President above the law, and above politics for that matter. There would be no legal or political redress. Impeachment would have no materiality or relevance. Elections, if they were ever held again, would not recall the devastation.

We can see that Congress cannot delegate to the President such an unlimited power. But then we can also see that Congress cannot exercise this power either. In fact, the real reason that Congress cannot delegate this power is that it does not have such a power. The essence of constitutionalism, says Professor Miller is limited government. Article I of the Constitution does not contain the grant of unlimited power. When we committed to Congress the power to declare war, we did not grant the power to declare Armageddon. There would be no appeal from such a declaration. We have given neither the President nor the Congress the right to use unbounded violence or violence without legal and political control. Self-destruction, if it is a right, is one retained by the people.

(2) If we start with nuclear war and think back rather than beyond, we find other procedural issues. For example, what is the process

14. 50 U.S.L.W. 4797 (U.S. June 24, 1982).

15. *Id.* at 4804 & n.41.

16. *Id.* at 4804 n.41.

17. *Id.* at 4804.

by which nuclear war comes about? Research on this subject by constitutional scholars could be divided into two phases: one from the present back to the origin of the nuclear possibility; the other forward to a projected hypothetical nuclear war.

With respect to phase one: How has today's situation come to be? Through what processes was our policy or lack of policy given shape? What defaults in constitutional process does this history expose? With respect to phase two: What exactly are the procedures by which nuclear war happens? Do these procedures entail nuclear war, or do faulty procedures allow nuclear strikes to take place in constitutionally suspect ways? (I hazard the guess that secrecy in these areas — such as chains of command — has far less legitimate scope than we are led to suppose.)

(3) If there are procedural arguments and procedural research remaining to be pursued, are there not also procedural actions to be considered? In addition to debating the subject, what ought lawyers do? What judicial, political or other steps should we take? For a start, would it not be lawyerlike to press for the procedural device of requiring impact statements detailing the effects of nuclear war and the arms race upon the environment?

Conclusion

Professor Miller's essay precipitates a final, unresolved thought: What if nuclear weapons are constitutional and nuclear war is legal? What might that reveal to us about our constitution? About our legal-political system? About ourselves? All the answers within range of my powers of vision appear utterly joyless. Ultimate honesty compels us to face those answers howsoever bitterly we may rue their content.¹⁸

18. Such honesty would be the contemporary form of repentance. As such, it would not be easily accomplished. One of the difficulties is the way in which people use God. As George Kennan has noted, during this century's world wars, both sides appealed to God for support of their military efforts. Kennan, *A Christian View of the Arms Race*, *THEOLOGY TODAY* 162, 170 (July, 1982). Howsoever questionable "this combination of religious faith and secular chauvinism . . . in those past instances" and howsoever it may appear that "modern military technology has now created conditions which allow only one (godly) answer to the possibility of a Soviet-American war," *Id.* I believe that history offers every reason to suppose that some people will nevertheless

appeal to God in support of even nuclear arms. There has long been an intimate involvement of religion in both American constitutionalism and warfare. This is neither the place nor the forum for trying to confront that controversial, complicated involvement. However, these matters are an issue in the question of the constitutionality of nuclear weapons. Suffice it to say here that the honesty necessary to face the answers to the questions posed in the text seems to me available only in the context of the biblical faith. But I also believe that the biblical tradition is to be understood by us in non-religious terms. As Dietrich Bonhoeffer proposed: "Man's religiosity makes him look in his distress to the power of God in the world: God is *deus ex machina*. The bible directs man to God's powerlessness and suffering; only the suffering God can help." D. BONHOEFFER, LETTERS AND PAPERS FROM PRISON 197 (E. Bethge ed. 1967). A *deus ex machina* is the ally of nuclear weaponry; the suffering God is the ally of its victims. (My own attempts at a theological understanding of law, first addressed in M. BALL, THE PROMISE OF AMERICAN LAW (1981), are the subject for continued exploration in another book now in progress.)

THE FRAIL CONSTITUTION OF GOOD INTENTIONS

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If I understand the architecture of Professor Miller's argument correctly, his lofty conclusion rests on two pillars, either of which he regards as adequate to support it; these pillars in turn arise from a single foundational premise. The conclusion, of course, is that the manufacture, deployment, or use of nuclear weapons is unconstitutional. The premise is that nuclear war is "[b]y definition" unlimited.¹ The first pillar is constructed from clauses of the Constitution reinforced with good intentions. The second is of similar construction, but is also girded by a novel interpretation of international law.

His essay is admittedly only a "preliminary inquiry"² into the constitutionality of nuclear weapons, but the architectural design must be examined to see if it affords any reasonable hope of supporting his conclusion.

Pillar I: The Well Intended Constitution

It is the leitmotif of Professor Miller's argument that the Constitution is not to be interpreted simply according to the terms of its text, but informed by the Constitution's intentions.³ These intentions, we learn, are not simply those of the people who wrote the text, but also, and primarily, those present and future generations who live under its authority.⁴ The ultimate end—stated vaguely enough to spark little opposition—emerges as "human survival under conditions that allow human dignity to be maximized."⁵ But the proper and good intention

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1. Miller, *Nuclear Weapons and Constitutional Law*, 7 NOVA L.J. 21, 30 (1982).

2. *Id.* at 23.

3. *Id.* at 27.

4. *Id.*

5. *Id.* at 26.

accompanying this end is to be found among the “clergy, physicians, scientists, and businessmen [who] have grasped and [seek] to show others the meaning of nuclear war.”⁶ Lawyers are thus invited to share their intentions and, so inspired, to read the text of the Constitution.

Three aspects of the Constitution contribute to the first pillar of support—the Preamble, the nondelegation doctrine, and the Due Process clause. Apparently Professor Miller believes each is independently capable of supporting his conclusion, for he does not indicate how they fit together except that they are each to be read with the Constitution’s “intention” in mind.

The most curious of these is the nondelegation doctrine. Professor Miller suggests that it is unconstitutional for Congress “tacitly or expressly”⁷ to delegate the authority to the President to declare nuclear war. One must wonder from what use of the nondelegation doctrine Professor Miller expects to draw support. The oldest and most straightforward use of the nondelegation doctrine is, as the term implies, to require that certain decisions can be made by Congress alone, that it cannot delegate these to any other body.⁸ But this argument can provide no support for Professor Miller’s conclusion that nuclear weapons are unconstitutional because it implies that Congress does have the constitutional authority to manufacture, deploy, and use nuclear weapons.

Perhaps Professor Miller has in mind a more recent use of the nondelegation doctrine, one which hinges on individual rights rather than congressional duty.⁹ It implies that an individual has a right to the careful reflection of Congress before his or her liberty is abridged. Conceivably that liberty could be expanded to the liberty to be free from nuclear threat. This use of the nondelegation doctrine could, like the first use, imply that Congress does have the authority to wage nuclear war. But the doctrine so used, unlike the first use, usually harbors a serious reservation about the power that Congress has exercised. While

6. *Id.* at 22.

7. *Id.* at 29.

8. *See, e.g.*, *Field v. Clark*, 143 U.S. 649 (1892) and *The Brig Aurora v. United States*, 11 U.S. (7 Cranch) 383 (1813). On the nondelegation doctrine generally, see S. BARBER, *THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER* (1975).

9. *See, e.g.*, *Kent v. Dulles*, 357 U.S. 116 (1958).

an actual constitutional limit to that power must be established independently of the nondelegation doctrine, the nondelegation doctrine is at least supposed to elevate the sensitivity, or "raise the consciousness," of Congress to constitutional limitations.¹⁰ Again, however, the nondelegation doctrine offers no support, in itself, for Professor Miller's conclusion.

And one must further wonder how this use of the nondelegation doctrine could function towards "consciousness raising." Following a nuclear exchange should the Supreme Court declare the war to have been unconstitutional? If Professor Miller is serious about his fundamental premise that nuclear war is by definition unlimited, then there would be no Congress left to have its consciousness raised. But perhaps the remedy lies in equity rather than in law. Should an injunction be issued to halt the President from contemplating a nuclear exchange until Congress explicitly assumes its constitutional obligation to set forth the conditions, if any, in which it thinks nuclear war proper? Until Congress makes up its mind, nuclear war would be limited, assuming improbably that the President heeds the injunction, but hardly in a way that Professor Miller or most any United States citizen can think desirable.¹¹

There is a third use of the nondelegation doctrine that might be thought to question the constitutionality of nuclear weapons, which would run as follows: only the President can act quickly enough to use nuclear weapons; only Congress can decide in each instance whether that use is justified. Aside from its wholly disingenuous use of the nondelegation doctrine, this argument requires propositions of fact and value that Professor Miller does not even assert, much less establish. Thus, under any of the three possible uses of the nondelegation doctrine, it lends no support to his conclusion and must be regarded as mere facade.

Infused with good intentions, the Preamble and the Due Process clause are also pressed into impossible duties. "Nuclear weapons and the delicate balance of terror jeopardize,"¹² he tells us, each of the

10. It is used, as Professor Alexander Bickel has noted, "in the candid service of avoiding a serious constitutional doubt." A. BICKEL, *THE LEAST DANGEROUS BRANCH* 165 (1962) (quoting *United States v. Rumely*, 345 U.S. 41, 47 (1953)).

11. Miller, *supra* note 1.

12. *Id.* at 27.

goals of the Preamble, especially in the sense that there might be no "posterity" remaining to enjoy them. Similarly, "[n]uclear weapons so endanger the lives, liberties, and properties of all Americans that they should be considered to be a deprivation contrary to Due Process."¹³ No doubt nuclear weapons do in some way jeopardize our goals and do endanger our lives, liberties, and properties. But we have to ask, compared to what?

Compared to a world in which there are only conventional weapons? Clearly this is what Professor Miller hopes for, but our posterity and our lives, liberties, and properties would not necessarily be rendered more secure. One must discount the gravity of nuclear war by its improbability,¹⁴ and one must remember that it was with conventional weapons that Rome lowered Carthage to dust.

But let's grant the preferability of a world without nuclear weapons. Can one discover a course of constitutionally mandated action? Professor Miller declares that guiding the course is a "duty to take action designed to eliminate the nuclear threat throughout the world."¹⁵ One might wonder how Professor Miller can leap from the Constitution's rights and goals to world duties, but if the United States had sovereignty commensurate with that duty throughout the world, the duty would not be difficult to follow. The problem, of course, is that such authority is lacking. What then can the United States do? We can unilaterally disarm and achieve peace through submission. But Professor Miller implicitly agrees that while this might eliminate the nuclear threat, it would sacrifice the nation's goals. We could take the initiative in reducing our forces, but there is no guarantee that the Soviet Union would follow suit and thus the delicate balance of terror could be rendered an indelicate imbalance. We could negotiate in good faith, but again there is no guarantee that the Soviet Union would do likewise. Finally the United States could attempt to achieve nuclear superiority and either negotiate from strength or, with a clear superiority, force the Soviet Union into submission. Professor Miller might wish the courts to appoint a special master to oversee the SALT negotiations, but what

13. *Id.* at 36.

14. Apologies to then Chief Judge Learned Hand, *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950).

15. Miller, *supra* note 1, at 24.

course of action that court appointee would mandate is far from clear.

In short, all that this pillar can support is a requirement to make a good faith effort to reduce the risk of nuclear war while not jeopardizing the nation's way of life. By no means is this a trivial obligation. But first, it does not differ in kind from the sort of duty we have assumed the Constitution to place on our public officials concerning conventional weapons, and second, the duty, involving in its essence questions of prudence and discretion, is wholly improper for judicial enforcement.

Pillar II: The Constitution Girded with International Law

Perhaps the most creative aspect of Professor Miller's argument is found in the construction of this second pillar where he attempts to argue that the Constitution imports a duty, to be judicially enforced, to obey international law, which he asserts is "surely"¹⁶ incompatible with nuclear weapons. The argument begins with the proposition that "Congress having been delegated the power to define and punish offenses against international law, has a duty to carry out that power."¹⁷ The thought continues that the President also might as well be assigned a duty "faithfully to execute" international law.¹⁸ And then why not have the Supreme Court "grasp the nettle and point out to the Executive and the Congress that officials in those branches are charged with [this] constitutional duty"?¹⁹

Putting aside the question of whether what is called international law, lacking both an authoritative interpreter and a means of enforcement, can be considered law—putting aside the fact that it is only in the recent writings of a few academic commentators that nuclear weapons are regarded as contrary to international law²⁰—putting aside all of

16. *Id.* at 23.

17. *Id.* at 33.

18. *Id.*

19. *Id.* at 35.

20. Professor Miller is apparently depending on the work of R. FALK, L. MEYROWITZ, & J. SANDERSON, *NUCLEAR WEAPONS AND INTERNATIONAL LAW* (Occasional Paper No. 10, World Order Studies Program, Center of International Studies, Princeton University (1981)). Other than this work, it is hard to discover much that can be used to support Professor Miller's claim that nuclear weapons are unconstitutional. There is the 1961 United Nations General Assembly Resolution 1653, 16 U.N. GAOR Supp. (No. 17) at 4, U.N. Doc. A/5100 (1961) asserting the use of nuclear

this—the argument that international law has a place in the Constitution superior to ordinary legislation and presidential action is wholly without foundation in the text of the Constitution, precedent, or the Framers' intent. The text of the Constitution does grant Congress the *authority* “to define and punish Piracies and Offenses against the Law of Nations;”²¹ but this authority implies a *duty* to enforce international law about as much as the authority of Congress to borrow money²² mandates a duty of deficit spending.

Recognizing the discretionary authority of Congress to define and punish offenses against the law of nations and recognizing that this requires the principle *leges posteriores priores contraries abrogant* (later laws abrogate prior laws that are contrary to them), the Court has consistently held that Congress has the authority, to which courts will give effect, to violate international law—even treaties—the most fundamental datum of international law. What international law provides, wrote Chief Justice John Marshall, “is a guide the sovereign follows or abandons at his will. The rule is addressed to the judgment of the sovereign: and although it cannot be disregarded by him without obloquy, yet it may be disregarded.”²³ The fact that Congress violates international law is, as Professor Louis Henkin has succinctly made the point, “constitutionally irrelevant.”²⁴

Nor has Professor Miller produced one shred of evidence that the Framers wished to subordinate national sovereignty to the dictates of international law. The wisdom of the contrary position—that occasionally it is necessary to subordinate international law to national sovereignty—is reinforced when we see that some, such as Professor Miller, are willing to see as a dictate of international law the freshest idealisms

weapons to be illegal (55 states voting in favor of the resolution, 20 states against, and 26 states abstaining). But as Professor Michael Akehurst points out in *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 252 (1978 3d ed), “A General Assembly resolution of this type is, at most, merely evidence of customary law; but the voting figures for this resolution show the absence of a generally accepted custom.” The United States voted *no* while the U.S.S.R. voted *yes*, possibly because of the latter's nuclear inferiority at the time. *Id.*

21. U.S. CONST. art. I, § 8.

22. *Id.*

23. *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128 (1814).

24. L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 410 n.11 (1972).

of a few academic commentators regardless of the consequences for national security.

To say that his interpretation is without foundation in conventional construction of the Constitution may leave Professor Miller undaunted, for again he understands the Constitution in terms of its "intentions" and he understands these intentions to be those of the well intended "clergy, physicians, scientists, and businessmen"²⁵ rather than the more modest ones of the Framers. If this beneficent sentiment proved insufficient to bestir the Due Process clause and the Preamble to join the march against the bomb, perhaps it is sufficiently engaging to disarm the world through international law. But again, even if we grant momentarily that Congressional authority to define and punish offenses against the law of nations could be puffed into a duty, which the courts could enforce, we confront the problems of limited power. Court injunctions could only extend to the United States government, and thus we would simply have to return to the prudential alternatives discussed above, running from submission to dominance.

Pursuing Professor Miller's apparent assumption that good intentions make up for what, under conventional interpretations of the Constitution, would be usurpation of authority, there may be, however, a way in which the Supreme Court could grasp the nettle and eliminate threats to the lives, liberties, and properties of the citizenry. It could make itself the authoritative interpreter of international law. It could secretly authorize a Super Manhattan project which would culminate in the construction of a nuclear weapon awesome and accurate enough to cow into submission all nuclear powers. Then the Court would be able to give clout to the special masters it appoints to strategic negotiations and to back the injunctions it would issue around the world in the name of enforcing international law.

Other than with this reinforcement, I can see no way that the superstructure of Miller's argument can withstand even minimal scrutiny.

The Foundation

My inquiry thus far has focused on the superstructure of Professor Miller's argument, though I have indirectly touched on the adequacy of

25. Miller, *supra* note 1, at 22.

its foundation. It is time to examine more closely his contention that nuclear war is "by definition" "unlimited."²⁶ If we fully grant this premise then the superstructure becomes ironically superfluous. For if nuclear war is "definitionally" unlimitable, it must be obviously unlimitable. If it is obviously unlimitable, no one with a modicum of intelligence and concern for self-interest would consider risking it, for one's missiles would in effect be directed towards oneself and all that one wishes to preserve. If such a person would not even contemplate the use of nuclear weapons, we are rendered about as secure against nuclear weapons as we could ever expect to be through any judicially enforced pronouncements.

But only as an exercise in abstract logic should we grant Professor Miller his premise. As a military analyst has recently argued, it is utterly ridiculous to believe that generals and politicians "would become so absorbed in the conflict-as-a-game that they would reply tit for tat, move by move, instead of stopping the war as soon as it had become nuclear, before it could destroy their own cities and their own families."²⁷ One would have to believe that mankind both in the battlefield and in civilian authority had become robots. And if we thus reasonably deny Professor Miller his premise, the structure of the argument collapses.

This is not to say that in several respects, I do not share Professor Miller's wistful yearning for a world free of nuclear weapons. There was at least dignity in the defense of Carthage in a way there can never be in a defense against nuclear destruction. But to allow this yearning for dignity to inform one's interpretation of the Constitution and judicial power, is to lay bare the frailty of good intentions.

Can Lawyers Contribute to the Debate?

Although Professor Miller urges the Supreme Court to "grasp the nettle"²⁸ on the question of the constitutionality of nuclear weapons, he realizes that it is "naïve"²⁹ to expect the Justices presently to do so. His

26. *Id.* at 30.

27. Luttwak, *How to Think About Nuclear War*, 74 COMMENTARY 21, 26 (Aug. 1982).

28. Miller, *supra* note 1, at 35.

29. *Id.* at 36.

apparent hope is to foster a “dialogue about the constitutionality of nuclear weapons,”³⁰ which in a fashion akin to the reapportionment cases will move the Court closer to his wished for declaration. He asks then rhetorically: “Is it really foolish to contend that law and lawyers have something useful to contribute to the growing debate about nuclear war?”³¹

Lawyers should be able to contribute to this debate. They should be able to remind us of the relevance of constitutional principles to changing circumstances. But to do so in the case of nuclear strategy, they must not only be aware of constitutional principles and of the relevance of those principles to the larger ends and limits of law and politics; they must also be knowledgeable as to the nature of those changing circumstances, which in this case means knowledge of diplomacy and strategy in the nuclear age. These are demanding criteria, but occasionally lawyers do meet them and make valuable contributions.³²

On that concluding point I find myself in partial accord with Professor Miller. It is not entirely foolish to contend that lawyers have something useful to contribute to the growing debate about nuclear war. But it is foolish to believe that many who meet the above criteria will agree with Professor Miller.

30. *Id.* at 36.

31. *Id.* at 21.

32. *Cf.* S. TALBOTT, *ENDGAME* 20-21 (1979).

Wisdom, Constitutionality, and Nuclear Weapons Policy

Dean Alfange, Jr.*

In a well-known passage in his famous dissent in the flag-salute case of 1943, Justice Felix Frankfurter wrote:

Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency of focussing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism. . . . Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law.¹

Arthur Miller does not subscribe to any such notion. For him, the principal function of courts of law is precisely to vindicate the most precious interests of civilization. In his view, the Constitution is not a finite set of narrow commands that establish a framework within which policy is to be determined. Rather, it is an expansive body of rules which, at any given time, require the adoption of the specific policy choices that would then best serve to achieve "the avowed goal of meeting current problems."² What wisdom dictates to be the most desirable way of attaining important social goals is what the Constitution demands. When applied to the issue of nuclear weapons, that approach yields the conclusion that since "the ultimate purpose of law [including constitutional law] is human survival under conditions that allow human dignity to be maximized"³ and since wisdom (indeed, common sense) tells

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1. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 670-71 (1943) (Frankfurter, J., dissenting).

2. Miller, *Nuclear Weapons and Constitutional Law*, 7 NOVA L.J. 21, 27 (1982).

3. *Id.* at 26.

us that the continued manufacture and deployment of nuclear weapons involves the increasing risk that eventually, by design or error, they will be employed and that their use would threaten the complete destruction of human civilization, the Constitution must forbid the government of the United States from following a policy that perpetuates the possibility of such a catastrophe. In addition, the Constitution must impose a "duty [upon the government] to take action designed to eliminate the nuclear threat throughout the world."⁴

Professor Miller is, of course, well aware that, despite its substantial appeal (particularly to those like me who agree as to the danger posed by the continued existence of nuclear weapons and the urgent need to eliminate the threat), such a conclusion is at odds with traditional approaches to constitutional interpretation. He recognizes that adoption of any of his points "would require creativity or innovation by a constitutional decision-maker,"⁵ and concedes it is unreasonable to expect that they would be accepted by the Supreme Court.⁶ Indeed, the novelty of his arguments is obvious. To Congress is delegated the power to declare war, to raise and support armies, and to provide and maintain a navy. No language in the Constitution nor any judicial decision known to me suggests that those powers do not carry with them the power to select the weapons with which the armies and the navy are to be equipped. And, however much we may pray that no President would ever again make the choice to employ atomic or nuclear weapons in war, surely, according to the accepted understanding of the Constitution, the authority of the Commander-in-Chief includes the power to decide which of the weapons provided by Congress are to be employed once hostilities have commenced.⁷ Moreover, much more precedent can be marshalled against, rather than for, the proposition that the Constitution obligates the three branches of the national government to ob-

4. *Id.* at 24.

5. *Id.* at 29.

6. *Id.* at 23.

7. The power delegated to Congress to declare war obviously limits the authority of the President to employ weapons *before* hostilities have commenced. *See* L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 80-81 (1972). But that limitation goes to the use of *any* weapons; it has no special significance with respect to nuclear weapons, even though it may apply with greater moral force where nuclear weapons are concerned.

serve and enforce norms of international law even where these are contrary to national law or national policy.⁸

The fact that a constitutional lawyer would be strongly tempted to employ constitutional argument to shape public policy on so vital an issue is certainly understandable.⁹ But Professor Miller faces a serious dilemma in that his argument is likely to be persuasive only to those who already agree with his policy position. Those who hold opposing views on the policy question are many and influential. They sincerely believe, however misguided, that the maintenance of a nuclear arsenal and the willingness to employ it where necessary are absolutely essential to the cause of peace and the security of our nation and its allies, and can readily dismiss Miller's argument with the accurate observation that settled constitutional law is to the contrary. Even those whose minds are not yet made up are unlikely to be won over by a constitutional contention that can be rebutted so effectively by arguments with impeccable traditional credentials.

If Professor Miller's purpose is simply to reinforce the resolve and commitment of those who already agree with him on the policy question by telling them that their views are not only supported by good sense, ultimate morality, and perhaps the norms of international law, but also reflect authentic constitutional commands, he may well be successful. But if his purpose is to change public opinion through constitutional argument, he must be able to convince his audience of the authoritativeness of that argument, and the authoritativeness of a legal argument can be demonstrated in only two ways: consensual agreement

8. See *id.* at 460-61 n.61. Professor Henkin flatly states that "the Constitution does not forbid the President (or the Congress) to violate international law and the courts will give effect to acts within the constitutional powers of the political branches without regard to international law." *Id.* at 221-22. See Feinrider, *International Law as the Law of the Land*, 7 NOVA L. J. 103 (1982) for opposing view.

9. The insightful observation of Felix Cohen seems squarely on point here: Clearly, for the sanitary engineer, the existence of untreated swamps is the cause of malaria. For the king's attendant with the palm-leaf fans, the bite of the mosquito is the only relevant cause. For the pathologist, the effect of the malaria virus upon red blood corpuscles is the cause. In each case the cause is the point at which effort can be usefully applied. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 255 (1950). For Professor Miller, as constitutional lawyer, the relevant cause of the nuclear weapons crisis must be the failure to recognize and apply proper principles of constitutional law.

among a substantial majority of those generally recognized as knowledgeable in the field or acceptance by a court—preferably an appellate court and most preferably the Supreme Court. Quite plainly, Professor Miller is in a position to make neither demonstration. Novel constitutional arguments designed to win the day for the adherents of one side of a controversial policy issue will, by their nature, be unable to command broad acceptance, and, as noted, Professor Miller concedes that his argument will be unlikely to find judicial favor. Even a favorable judicial ruling may, of course, be insufficient to resolve a disputed constitutional issue, as long ago demonstrated by the categorical rejection by the North of the Dred Scott decision of 1857,¹⁰ and as may clearly be seen today in the ongoing debates over such questions as abortion policy,¹¹ the exclusionary rule,¹² and school busing for the achievement of racial desegregation.¹³ But the instances in which public opinion and public policy have been changed by constitutional reasoning¹⁴ have necessarily involved judicial pronouncements which have given moral force to debatable constitutional arguments by converting them into rules of law. Without such legitimation,¹⁵ mere argument, no matter how cogent and thoughtful, lacks the authority necessary to lead persons of differing views to abandon their prior positions on policy questions.

Professor Miller is surely right in his observation that “[i]t would be naive to expect the Supreme Court to intervene”¹⁶ on the issue of nuclear weapons policy. But is this merely because, as he suggests, “judges are timorous officers of government . . . [who] look upon requests to go beyond the familiar and the expected as frightful occa-

10. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). For a description and discussion of the political reaction engendered by this decision, see D. FEHRENBACHER, *THE DRED SCOTT CASE* 417-567 (1978).

11. See, e.g., F. JAFFE, B. LINDHEIM & P. LEE, *ABORTION POLITICS* (1981); E. RUBIN, *ABORTION, POLITICS, AND THE COURTS* 87-161 (1982).

12. See, e.g., S. SCHLESINGER, *EXCLUSIONARY INJUSTICE* (1977).

13. See, e.g., the antijudicial diatribe of L. GRAGLIA, *DISASTER BY DECREE* (1976).

14. The paradigm case is, of course, the effect of *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) in ending de jure racial segregation.

15. The classic discussion of the legitimating function of the Supreme Court is in C. BLACK, *THE PEOPLE AND THE COURT* 56-86 (1960).

16. Miller, *supra* note 2, at 36.

sions"?¹⁷ Is the problem really only one of judicial timidity? It does seem severe to label as timorous a federal judiciary which has, in recent years, recognized abortion as a constitutional right,¹⁸ ordered the President of the United States to relinquish evidence that would incriminate him with regard to the commission of impeachable offenses,¹⁹ drastically curtailed the imposition of the death penalty,²⁰ required unwilling school boards to implement sweeping remedial plans for bringing about the desegregation of public schools,²¹ and taken over the administration of particular prisons or of entire prison systems in some 24 states.²² It is thus a good deal less likely that the anticipated judicial reluctance to intervene in nuclear weapons policy is to be attributed to the inherent timorousness of judges than to their probable views on the proper role of courts in the governmental process and on the relationship between the wisdom of a policy and its constitutionality.

This leads to the inevitable question: what *is* the proper relationship between the wisdom of a policy and its constitutionality? Or, to put the same question somewhat more directly, when should judges insist, as a matter of constitutional law, upon the adoption of a policy they deem wise or the rejection of a policy they deem unwise? When should they be prepared to remove a policy issue from the political forum, where numbers count, in order to decide it in the judicial forum, where numbers can be ignored? These issues have been exercising constitutional scholars a great deal in recent years, yielding a wide variety of answers across a spectrum that finds Arthur Miller perhaps closest to one end²³ and Raoul Berger closest to the other.²⁴ The answers at

17. *Id.*

18. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

19. *United States v. Nixon*, 418 U.S. 683 (1974).

20. *See, e.g., Woodson v. North Carolina*, 428 U.S. 280 (1976). A listing of cases in which the Supreme Court invalidated the imposition of death sentences between 1976 and May, 1980, may be found in the concurring opinion of Justice Marshall in *Godfrey v. Georgia*, 446 U.S. 420, 438 n.5 (1980).

21. *See* the discussion in *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 458-61 (1979).

22. For a comprehensive list of states in which courts had taken over the administration of prisons as of 1981 and of the decisions which brought these results about, *see* the concurring opinion of Justice Brennan in *Rhodes v. Chapman*, 452 U.S. 337, 353-54 n.1 (1981).

23. *See* A. MILLER, *TOWARD INCREASED JUDICIAL ACTIVISM* (1982); Miller,

the very extremes of the spectrum are “never” and “whenever they want,” but both of these are unacceptable. To answer “never” is to oblige the judiciary to treat as constitutional such policies and practices as “separate but equal” racial segregation, gross legislative malapportionment, and the maintenance of prison systems in which inmates are confined in conditions of ghastly and barbaric inhumanity.²⁵ To cite the wise counsel of Justice Harlan Fiske Stone, refraining in all cases “from passing upon the legislative judgment ‘as long as the remedial channels of the democratic process remain open and unobstructed’ . . . seems . . . no less than the surrender of the constitutional protection of the liberty of small minorities to the popular will.”²⁶

On the other hand, to answer “whenever they want” is to maintain that judges, rather than the branches of government responsive to the electorate, should have the ultimate authority to decide the content of government policy — an authority which they would exercise by invoking the Constitution whenever they disagreed with the manner in which Congress or the President proposed to deal with a national problem. It is clear that Professor Miller does not find that answer unattractive, nor its consequences undesirable.²⁷ Unlike Learned Hand, he would have no misgivings about being “ruled by a bevy of Platonic Guardians,”²⁸ for he would have no doubt that Platonic Guardians could be counted on to do better in insuring “human survival under conditions

The Case for Judicial Activism, in SUPREME COURT ACTIVISM AND RESTRAINT 167 (S. Halpern & C. Lamb eds. 1982).

24. R. BERGER, GOVERNMENT BY JUDICIARY (1977). Berger’s view is that judicial policymaking is never legitimate, and that the only proper function of courts in constitutional adjudication is to ascertain and faithfully (slavishly) to apply the original intention of those who framed and ratified the constitutional provision at issue. I have elsewhere criticized Berger’s position at some length. See Alfange, *Another Look at the “Original Intent” Theory of Constitutional*, 5 HASTINGS CONST. L.Q. 603 (1978).

25. For a lengthy and disturbing, but not exhaustive, list of the policies and practices that would have to be constitutionally tolerated if the answer to this question were “never,” see Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L. REV. 703, 710-14 (1975).

26. *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 605-06 (1940) (Stone, J., dissenting).

27. See the works cited *supra* note 23.

28. L. HAND, THE BILL OF RIGHTS 73 (1958).

that allow human dignity to be maximized”²⁹ than would individuals whose continuation in office depends on their attentiveness to the pressures of interest-group politics. Perhaps he is right. Nevertheless, that answer has implications that are profoundly troubling.

It is likely that Platonic Guardians would be fallible; it is certain that judges are.³⁰ There is no abstract reason for believing that the policies judges might choose, after considering the arguments of lawyers on behalf of their clients, will in fact be wiser than the policies enacted into law by Congress after considering the representations of interest-group spokesmen on behalf of their constituents, or than the policies adopted by the President after considering the counsel of his advisers. But the argument that judges should assume authority to invalidate laws or policies they deem unwise is rarely, if ever, based on abstract considerations. There is no mystery as to who may be expected to advocate or oppose that argument. Those who suspect that the democratic political process will yield policies with which they disagree, and that, if courts were allowed to decide, more favorable policies would be adopted, will argue for the equation of wisdom and constitutionality and for judges to protect us all from the folly of majoritarianism. Those who believe that the policies the political branches are likely to adopt will be reasonably sound, and that judicial involvement will probably result in actions that are retrogressive and unenlightened, will argue for the strict separation of wisdom and constitutionality and for judges to refrain from deciding constitutional questions on the basis of their own views of wise public policy. It is thus no coincidence that in the period from the 1880s to the New Deal, when judicial review was perceived as a major obstacle to the cause of social and economic reform, liberal opinion was united in its criticism of the courts for their failure to respect the distinction between wisdom and constitutionality.³¹ Similarly, the enthusiasm of liberals for judicial intervention in

29. See *supra* note 3 and accompanying text.

30. The classic statement of this proposition is that of Justice Jackson: “We [the Supreme Court] are not final because we are infallible, but we are infallible only because we are final.” *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

31. As Robert Jackson noted shortly after the end of this period, the “long-smouldering intellectual revolt against the philosophy of many of the Supreme Court’s decisions [equating wisdom and constitutionality] . . . was led by outspoken and

policy matters that blossomed during the era of the Warren Court can hardly be unrelated to their preference for the policies that present-day judges can sometimes be persuaded to adopt.³² Conversely, conservatives, who once looked upon courts as a bastion for the protection of property rights against legislative policies they abhorred,³³ have come to see the virtue of distinguishing wisdom from constitutionality now that they perceive that policies favored by the courts may be less to their liking than those of the legislature.³⁴ Over the years, the argument that courts should ignore the distinction between wisdom and constitutionality by substituting their own policy choices for those of the political branches has been made and opposed on behalf of causes both noble and not so noble.

The belief that judges can reliably be counted on to share one's own conception of wise public policy may be both rational and accurate with regard to specific issues at specific times. It is a more dubious basis, however, for a defense of judicial policymaking on all public questions in all periods. Given the fact that there is no *a priori* reason to assume that the policy choices of courts will be objectively better than those of the legislature, or that judges, who vary widely in philosophy and perspective, will consistently share one's values on public mat-

respected members of the Court itself . . . [and was joined by] those in our universities distinguished for disinterested legal scholarship . . . many thoughtful conservatives and practically all liberals and labor leadership." R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* v (1941).

32. See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* iv-v (1978).

33. The clearest statement of this view was perhaps that of Justice Brewer:

I am firmly persuaded that the salvation of the nation, the permanence of government of and by the people, rests upon the independence and vigor of the judiciary. To stay the waves of popular feeling, to restrain the greedy hand of the many from filching from the few that which they have honestly acquired, and to protect in every man's possession and enjoyment, be he rich or poor, that which he hath, demands a tribunal as strong as is consistent with the freedom of human action and as free from all influences and suggestions other than is compassed in the thought of justice, as can be created out of the infirmities of human nature. To that end courts exist

Brewer, *The Nation's Safeguard*, *PROCEEDINGS OF THE NEW YORK STATE BAR ASSOCIATION* 37, 47 (1893).

34. See, e.g., Graglia, *In Defense of Judicial Restraint*, in *SUPREME COURT ACTIVISM AND RESTRAINT*, *supra* note 23, at 135-37.

ters, it would seem difficult to argue for a broad judicial policymaking role in all areas. Certainly even the most optimistic judicial activist today can feel no assurance that courts, given freedom to make their own policy choices "whenever they want," will no longer use that power to block legislative efforts at social, political, or economic reform.³⁵ To invite judges to equate their own notions of wise policy with the requirements of the Constitution, and to do so on their own terms, is to run the risk of opening a Pandora's Box of unforeseeable content.

If an understandable basis for advocating judicial activism in all areas of policy is difficult to perceive, it is easy to see a principled justification for an across-the-board opposition to judicial policymaking—it seems squarely inconsistent with democratic theory. As Terrance Sandalow has written: "Reducing the influence of politics upon governmental policy is, in short, a means of reducing the influence on policy of those whose lives are affected by it."³⁶ The observation that judicial policymaking is antidemocratic is, of course, not new,³⁷ nor has it gone unchallenged.³⁸ The basis of the challenge, as it is most commonly made, is that democracy, at least in its pure form, was not the form of government chosen by the framers of the Constitution, who, through such means as the electoral college, the imposition of constitutional re-

35. For recent examples of transparent exercises of judicial policymaking in which legislative efforts at social, economic, or political reform were thwarted, *see, e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976) (declaring invalid, on first amendment grounds, the critical expenditure-limitation provisions of the Federal Election Campaign Act Amendments of 1974 through which the Congress had sought to protect the integrity of the federal election process against the kinds of abuses that came to light as a result of the Watergate scandals); *National League of Cities v. Usery*, 426 U.S. 833 (1976) (striking down, apparently on tenth amendment grounds, the extension by Congress of the coverage of the Fair Labor Standards Act of 1938, as amended, to the employees of state and local governments); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (striking down, on first amendment grounds, a Massachusetts law intended to control the impact of corporate spending on referendum elections); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) (striking down, on contract clause grounds, a Minnesota law intended to protect the pension benefits of employees against the risk of plant shutdowns prior to the establishment of their pension eligibility).

36. Sandalow, *The Distrust of Politics*, 56 N.Y.U. L. REV. 446, 459 (1981).

37. *See, e.g.*, the discussion in A. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-23 (1962).

38. *See, e.g.*, C. BLACK, *supra* note 15, at 179-81; Bishin, *Judicial Review in Democratic Theory*, 50 S. CAL. L. REV. 1099 (1977).

straints on certain types of majority action, and the creation of an appointed and life-tenured judiciary, sought to guarantee that the will of the people would be held within tolerable bounds.³⁹ Judicial review, the argument goes, although not specifically mentioned in the Constitution, is simply another of the checks in the constitutional framework. Moreover, since its exercise has been warmly accepted by the people, it must be seen as having been approved by democratic choice, and thus cannot be said to be undemocratic.⁴⁰ In addition, it is claimed that the whole argument that courts should defer to the policy judgments of the political branches in order to respect the will of the majority is misconceived because, even if it could be assumed that there is such a thing as the majority will and that it is possible to ascertain in practice what that will actually is, the political branches (particularly Congress) are selected and organized in such a way as to insure its frustration, not its effectuation.⁴¹

These challenges to the claim that judicial policymaking is antidemocratic have been answered meticulously and effectively by Jesse Choper,⁴² whose argument cannot even be summarized here. Suffice it to say that, while one must concede the existence of myriad ways in which the political branches can function undemocratically and escape public accountability, Congress and the President remain vastly more responsive to public opinion than the federal courts. And, while the American people clearly favor judicial review and expect the courts to hold the other branches of government within constitutional limits, it requires an enormous jump to conclude from that observation that the public would approve the courts' use of that power to invalidate presidential or congressional action in any case in which the judges deemed the policy underlying that action to be mistaken.⁴³ While the framers

39. *See id.* at 1104-08.

40. C. BLACK, *supra* note 15, at 178-79, 210-12.

41. The best, and perhaps now the classic, statement of this argument is in M. SHAPIRO, *FREEDOM OF SPEECH* 17-25 (1966).

42. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 29-59 (1980).

43. There is more than a little merit in the observation of Robert Bork: The Supreme Court regularly insists that its results, and most particularly its controversial results, do not spring from the mere will of the Justices in the majority but are supported, indeed compelled, by a proper understand-

undoubtedly were uneasy about some of the possible ramifications of majority rule and sought to guard against its potential excesses, they did so, as Gordon Wood describes it, "without repudiating the republicanism and the popular basis of government that nearly all devoutly believed in."⁴⁴ That the action of the people's representatives may need to be checked from time to time and in particular ways does not render unlimited judicial policymaking legitimate. If judges may freely substitute their own policy preferences for those of the legislature, we should no longer claim to be a democracy, and should seek to find a new name and a new theory for the governmental system which has evolved.

If judicial policymaking—the equation of wisdom with constitutionality—is sometimes imperative but not always permissible, just when is it proper and defensible? My own choice for the proper starting place in the search for the answer is Justice Stone's justly celebrated *Carolene Products* footnote of 1938.⁴⁵ There Stone suggested that the political process was the proper area for the resolution of policy questions⁴⁶ except where effective access to it is wholly or partially closed off to the persons affected by the policy at issue or where "prejudice against discrete and insular minorities"⁴⁷ seems likely to have been the motivation for its adoption or enforcement. In those cases, courts may legitimately view with skepticism the results arrived at through the political process and undertake to assess for themselves

ing of the Constitution of the United States. Value choices are attributed to the Founding Fathers, not to the Court. The way an institution advertises tells you what it thinks its customers demand.

Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3-4 (1971).

44. Wood, *Democracy and the Constitution*, in HOW DEMOCRATIC IS THE CONSTITUTION? 1, 16 (R. Goldwin & W. Schambra eds. 1980).

45. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938). It is precisely because it uses the *Carolene Products* footnote as the starting place in the search for the answer that I find J. ELY, *DEMOCRACY AND DISTRUST* (1980) to be the most pregnant and insightful of the recent writings on the legitimate role of judicial review in a democratic society. Professor Miller is, of course, not of the same opinion. See Miller, Book Review, 32 U. FLA. L. REV. 369 (1980).

46. Stone's view of the proper locus of policymaking authority in the ordinary case was forcefully expressed in his dissenting opinion in *United States v. Butler*, 297 U.S. 1, 78-88 (1936).

47. The term comes from the third paragraph of the *Carolene Products* footnote, 304 U.S. at 153 n.4.

the desirability of the policy outcome.⁴⁸ The thrust of Stone's *Carolene Products* approach (at least the approach described in the second and third paragraphs of the footnote)⁴⁹ may be characterized as resting upon a "legislative failure" theory⁵⁰—that is, the theory that judicial resolution of the policy questions inherent in constitutional adjudication becomes permissible when the political process (most commonly the legislative process) fails adequately to perform its function of attaining a just and fair compromise among competing interests because of imperfect access or prejudice.

It may be that a legislative failure theory alone is insufficient to cover all of the circumstances in which the policy judgments of the legislature may be judicially disregarded. Institutional considerations may undoubtedly justify a greater role for courts in the evaluation of procedural, as opposed to substantive, rules,⁵¹ and there should be some

48. As Stone was to write two years after *Carolene Products*:

History teaches us that there have been but few infringements of personal liberty by the state which have not been justified . . . in the name of righteousness and the public good, and few which have not been directed . . . at politically helpless minorities.

Minersville School Dist. v. Gobitis, 310 U.S. 586, 604 (1940) (Stone, J., dissenting).

49. There is another paragraph — the first — which suggests that courts might be justified in not accepting the policy judgments of the political branches where the action being challenged appears to violate one of the specific prohibitions of the Constitution. This paragraph was not in Justice Stone's original version of the footnote but was added later at the urging of Chief Justice Hughes. See L. LUSKY, *BY WHAT RIGHT?* 108-11 (1975). It is somewhat at odds with the portion of the footnote that Stone had conceived because it seeks to justify judicial rejection of legislative policy judgments, not on the basis of any reason to believe that the legislative process may not have functioned fairly, but solely on the text of the Constitution. See *id.* at 111-12. Since the text is usually not self-defining, ascribing meaning to its provisions is an act of policymaking. If, as Stone believed, courts should defer to the policy judgments of the political branches in the ordinary case, why not in these cases as well? That is, as long as there is no ground for suspicion that the political branches may be unjustly disfavoring those without an effective voice in the political process or those toward whom majoritarian prejudice may be directed.

50. It has, in fact, been so characterized by Owen Fiss. See Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 6-11 (1979). Professor Fiss is extremely critical of the *Carolene Products* approach because he rejects its "general presumption in favor of majoritarianism." *Id.* at 6.

51. Even Justice Frankfurter, who saw no room for judicial reexamination of the substantive policy choices of the legislature as long as these choices could be said to be

room for judicial invalidation of statutes touching on individual rights where these cannot be said to serve any legitimate public purpose⁵² or where, in the classic formulation of Justice Oliver Wendell Holmes, "a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."⁵³ But surely the protection of the powerless and the unrepresented from a hostile or unsympathetic majority is manifestly the great and vital function of judicial review. It is the fulfillment of that function that amply justifies judicial policymaking in certain situations: defending the right to hold and to express beliefs that the majority may regard as abhorrent;⁵⁴ eliminating gross legislative malapportionment⁵⁵ or discriminatory gerrymandering;⁵⁶ abolishing all vestiges of racial discrimination that stigmatizes its victims;⁵⁷ taking whatever affirmative action may be required to insure

rationally related to the achievement of a proper public purpose, *see, e.g.*, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 647 (1943) (Frankfurter, J., dissenting), conceded the propriety of "the exercise of judgment" by courts in the evaluation of procedures employed in criminal trials "to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples." *Adamson v. California*, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring).

52. *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965), invalidating Connecticut's anti-contraception law. *Cf.* Justice Harlan's statement in *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (dissenting opinion), that due process forbids "all substantial arbitrary impositions and purposeless restraints." The abortion cases, *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 197 (1973), cannot be said to involve purposeless restraints and thus present a far more difficult issue than *Griswold*. *See, e.g.*, Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 SUPREME COURT REVIEW 157.

53. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

54. That is, the kind of protection that the Supreme Court, to its discredit, did not provide in the years following both World Wars. *See, e.g.*, *Schenck v. United States*, 249 U.S. 47 (1919); *Dennis v. United States*, 341 U.S. 494 (1951). *Cf.* *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

55. *See Reynolds v. Sims*, 377 U.S. 533 (1964).

56. *See Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

57. *See Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Race-conscious legislation that does not stigmatize those who may be adversely affected is another matter. *See Regents of the University of California v. Bakke*, 438 U.S. 265, 373-76 (1978) (opinion of Brennan, White, Marshall, and Blackmun, JJ.). As Laurence Tribe has noted: "When the group in control of the political process adopts classifications which protect or benefit a minority and burden itself, the reasons are absent for regarding the govern-

that public school authorities meet their constitutional responsibility to establish and maintain school systems "in which racial discrimination would be eliminated root and branch;"⁵⁸ and guaranteeing that conditions of confinement in state prisons are not so inhumane and barbaric as to constitute cruel and unusual punishment.⁵⁹ At the same time, recognition that legislative failure to protect the rights of those who have suffered from prejudice or inadequate representation provides the fundamental justification for judicial policymaking would spare us judicial interference with the policy decisions of the political branches in cases where those who seek judicial protection from the effects of those policies are themselves in command of substantial political resources and cannot reasonably be looked upon as the targets of irrational majority hostility.⁶⁰

But under almost any theory that recognizes some limitations on judicial discretion, it is difficult to understand how the issue of nuclear weapons policy could be said to fall within the range of questions that may be deemed appropriate for judicial, as opposed to political, resolution. I am not disposed to deny that the issue is one on which human survival may ultimately depend, or that the policy of increasing our stockpiles of missiles and warheads (while seeking to negotiate for their overall limitation) and of maintaining a first-strike capability is one that carries with it the terrible risk of the eradication of civilization.

mental choice with suspicion, and therefore for strictly scrutinizing the results." L. TRIBE, *supra* note 32, at 1044.

58. *Green v. County School Bd.*, 391 U.S. 430, 438 (1968).

59. Prisoners clearly fall within the scope of both the second and third paragraphs of Justice Stone's *Carolene Products* footnote (see *supra* text accompanying note 47). They have no access to the political process and they are a "discrete and insular" minority. They are "voteless, politically unpopular, and socially threatening." *Rhodes v. Chapman*, 452 U.S. 337, 358 (1981) (Brennan, J., concurring).

60. Among the recent judicial excrescences that might have been avoided under a legislative failure theory are *Buckley v. Valeo*, 424 U.S. 1 (1976) (declaring invalid the expenditure limitations in the Federal Election Campaign Act Amendments of 1974, even as applied to the campaigns of the Republican and Democratic candidates for federal office — individuals who, as a group, are probably the least lacking in political efficacy of anyone in the country); *National League of Cities v. Usery*, 426 U.S. 833 (1976) (declaring invalid the application of the Fair Labor Standards Act of 1938 to employees of state and local governments, in disregard of what Justice Brennan, in dissent, described as "the enormous impact of the States' political power" when exercised in the federal political process. *Id.* at 878 (Brennan, J., dissenting)).

But the urgency of the issue and the potentially frightful consequences of miscalculation are not what should determine whether the matter is one for the political or the judicial process. In fact, recalling the observation of Terrance Sandalow, one might reasonably conclude that the more urgent the issue, the more vital it is to avoid "reducing the influence on policy of those whose lives are affected by it."⁶¹ Shifting the question to the judicial forum converts it into a dispute to which most of us become bystanders; leaving it in the political process can nurture a sense of public responsibility—such as is currently being manifested in the rapid growth of the grass-roots movement for a nuclear freeze. Moreover, raising the issue in the courts carries its own risks, which ought not to be minimized. As Charles Black has shown, judicial action can do much to legitimize governmental policy.⁶² A ruling by the Supreme Court that the maintenance of a nuclear weapons arsenal is constitutional (which is the only ruling realistically to be expected should the question actually reach the Court and be decided on the merits) could, in light of the public tendency noted by Justice Frankfurter "to regard a law as all right if it is constitutional,"⁶³ seriously undermine the cause of opposition to nuclear weapons⁶⁴ by raising doubts in the minds of many persons about the point of continuing to object to a policy whose validity has been judicially affirmed.

Obviously, the issue of nuclear weapons policy is not one where access to the political process is in some way closed off to those whose interests are affected.⁶⁵ Nor is it one where the government's policy is

61. See *supra* note 36 and accompanying text.

62. See *supra* note 15.

63. See *supra* note 1 and accompanying text.

64. The legitimating function of the Supreme Court has already dealt a blow to the opponents of nuclear power plants. Ignoring serious questions of standing in order to reach the merits of a suit brought by groups seeking to block plant construction, the Court gave advance validation to the Price-Anderson Act of 1957, which limits the total amount of a company's liability in the event of a nuclear accident. As long as the validity of the act was an open question, companies had a strong motivation for caution in entering the nuclear power industry. The legitimization of the act took away that need for caution and gave the companies concerned a significant stimulus to proceed. See *Duke Power Co. v. Carolina Env'tl. Study Group*, 438 U.S. 59 (1978).

65. Of course, human survival is not a question about which only citizens of the United States have an interest. Every person in the world may well have a life-or-death interest in what the policy of the United States is with regard to nuclear weapons, but

aimed at, or may be expected to have its harshest effects upon, a disadvantaged minority. If nuclear war should come, the costs will be shared evenly by all, including the officials responsible for developing and supporting the policy that may have led to it. Judicial intervention thus cannot be justified on the basis of a theory of legislative failure. Indeed, the issue is not, in the traditional sense, one of individual liberties at all. For, despite the potential costs to us all, the government is not seeking to deprive anyone of life, liberty, or property; it is seeking—beyond a doubt, sincerely—to protect the nation, its people, and its allies from a possible external threat, and, presumably, to advance the cause of world peace through nuclear deterrence. In that regard, it cannot be said that the government's policy is unrelated to the attainment of a legitimate public purpose or that it is rationally insupportable. As strongly as I believe that a policy which accepts the risk of nuclear war is intolerable, and as easily as I may talk in private about "nuclear madness," I would find it impossible to assert that no rational and fair man could subscribe to the government's policy or could conscientiously accept its assumption that the surest way of avoiding nuclear war—a goal, I trust, that everyone shares—is to maintain a nuclear force of sufficient strength to deter the use of such weapons by anyone else.

What is more, it is not clear what courts could do even if they undertook to call into question the validity of the government's policy. They could presumably hold that it is unconstitutional for the United States to maintain nuclear weapons, but what then? Professor Miller emphatically states that he is not advocating unilateral disarmament, but merely urging a recognition of the government's constitutional duty "to take action designed to eliminate the nuclear threat throughout the world"⁶⁶—which means, I presume, a duty to negotiate with other nations to effect the abolition of nuclear weapons. Similarly, no court could be expected to order unilateral disarmament; the most it could do would be to order the government to enter into disarmament negotiations. But I fail to see how such an order would markedly alter the

only United States citizens have direct access to the American political process. However, since the interest of all persons in survival is identical, the claims of nonresidents of the United States may be fully represented by their counterparts among United States citizens. This is a genuine class-action matter regardless of whether it is heard in the political process or the judicial process.

66. Miller, *supra* note 2, at 24.

existing situation. Nuclear weapons would continue to exist (and presumably, to be manufactured and deployed) during the course of whatever negotiations would be held. The negotiations themselves would be carried out by the President (for I doubt that even Professor Miller is yet prepared to urge that federal courts oust the President from the process and commence their own negotiations with foreign governments), and would in all likelihood go on pretty much as at present. Because any judicial declaration of the unconstitutionality of nuclear weapons would have no effect until the completion of successful negotiations, it could not be expected either to cause the government to negotiate differently than it otherwise would or to cause the public to put greater pressure on it to conclude an agreement. The President would be no more willing to sign a treaty except on terms that he would consider to be fully consistent with the security interests of the United States and the public would be no more prepared to insist that the government accept less than the most favorable possible agreement. Nuclear weapons are already generally perceived as abominable; yet, as long as they are possessed by other nations, considerations of national security make the abominable seem tolerable. It is extremely doubtful that a judicial declaration of unconstitutionality would do more to cancel out these national security concerns than abhorrence already does.

In sum, regardless of the magnitude of the stakes, what our nuclear weapons policy should be seems clearly to be a question of wisdom, not of constitutionality. The policy area is one where responsibility for decision making is squarely and unequivocally delegated to the political branches by the Constitution. The soundness of the policy raises questions about which reasonable men may differ. The hazards that the policy generates must be faced as fully by the policymakers themselves as by any inadequately represented or disadvantaged minority group. All of these factors point to the appropriateness of a political resolution, as courts undoubtedly would recognize should the issue somehow be brought before them.

It seems likely that the ultimate purpose of Professor Miller's breathtaking exercise in constitutional reasoning is not the futile and misdirected effort to involve the courts in the resolution of this ques-

tion,⁶⁷ but the generation of additional political pressure for a reversal of current governmental policy. If that is his purpose, I wish him well. But it is essential to remember that the horse must be kept in front of the cart. It may well be that in some saner future, if humanity does eventually manage to overcome the threat of nuclear devastation, it will be the common understanding that nuclear weapons are wholly unacceptable in a civilized world. That understanding may then come to be recognized as an integral part of our constitutional law. When that time is reached, Professor Miller's article may well be looked back upon as the first groundbreaking step leading us to the path of higher constitutional wisdom. But that higher constitutional wisdom will not be achieved unless we first become convinced of the absolute necessity of abolishing nuclear weapons as a matter of policy. Until the day has been won on the policy question, the argument for the unconstitutionality of nuclear weapons will remain a curiosity except to those who already share its underlying policy premises. It is indispensable, therefore, that current efforts to change national policy be directed at persuading those who do not yet agree that continued reliance on nuclear weapons is unwise rather than unconstitutional.

67. It might be argued, with some merit, that the opponents of current nuclear weapons policy have little to lose by trying to raise the issue of the constitutional merits of that policy in the courts as well as in the political process. If they lose in the political process, they just might win in court; on the other hand, if they win in the political process, there is no danger that the courts would overturn that victory. It is certainly true that courts would not overturn such a political victory as long as the traditional limitations on judicial authority are respected. But, while fanciful, it is possible to imagine judges appointed by Ronald Reagan and holding the views on the scope of judicial power and the concept of affirmative constitutional duty espoused by Arthur Miller (see Miller, *Toward a Concept of Constitutional Duty*, 1968 SUPREME COURT REVIEW 199) who might assert that since the Constitution imposes upon the federal government the affirmative constitutional duty to protect human dignity, and since human dignity is only possible in a non-Communist society, the Constitution requires the United States to maintain and deploy an arsenal of nuclear weapons sufficient to guard against the possibility of successful Communist aggression. Why is it necessary to assume that the policy decisions of judges will be ones that we would embrace? That was certainly not the case prior to 1937. It is not always the case today. It need not be the case in the future.

Nuclear Weapons Policy: The Ultimate Tyranny

*Elliott L. Meyrowitz

In *Foreign Affairs and The Constitution*,¹ Professor Louis Henkin pointed out that one of the important traditional functions of the Constitution, albeit many times overlooked and ignored, has been to limit the actions of our government in the area of foreign relations. The original conception of democratic life rested primarily on the idea that restraints must be placed upon governmental leaders. The founders of the Republic wanted to prevent the evils of absolute power in foreign affairs. In fact, as Professor Henkin also pointed out,² how the Constitution should govern the conduct of foreign affairs was a prominent concern during the deliberations of the constitutional convention. Eventually, Congress was entrusted with the responsibility to declare war, and the President, as Commander-in-Chief, was expected to carry out foreign policy within a framework of law.

Notwithstanding the intent of the framers of the Constitution, courts in the United States have been extremely reluctant to examine questions touching on foreign policy, concluding that such issues are nonjusticiable because the subject matter of foreign relations is entrusted to the discretion of the executive branch of government. In the background of this judicial thinking lurks the notion that the sovereign has unfettered discretion in the area of foreign relations. Ironically, those very same courts continue to uphold the idea that restraint in the domestic sphere is necessary if the courts are to guard society from abuse by the state.

There is no issue more central to the conduct of United States foreign policy than the strategies associated with the threat of use or the actual use of nuclear weapons. Nevertheless, for thirty-seven years,

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1. L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1972).
2. *Id.* at vii.

American legal institutions have been either indifferent to the impact of the nuclear weapons structure on democratic governance or believed that the Constitution has little, if any, role to play in areas of "high policy" such as national security. If there has been any discussion on this subject at all, it is generally claimed by the legal community and policy-makers alike, that the existence of nuclear weapons under the doctrine of deterrence is *the* bulwark of American freedom, which in turn only adds to the enormous responsibilities of the President in the area of foreign policy.

In his article, *Nuclear Weapons and Constitutional Law*,³ Professor Miller has broken this profound and dangerous silence. By pointing out the serious defects in our governing process caused by our nuclear weapons policy, he refuses to accept the notion that the Constitution is irrelevant to questions of momentous historic importance. His arguments are built upon the idea that if the Constitution was relevant to the formation of our government, it is equally relevant to policies which could destroy the nation. Hence, implicit in Professor Miller's analysis is a well justified belief that the issue of nuclear weapons is of far too great an importance to be the preserve solely of government leaders, foreign policy experts or military professionals. Citizens in general, and the legal community in particular, must be involved in deciding the momentous question of whether there are any rational or moral grounds for using nuclear weapons. The publication of Professor Miller's analysis is particularly gratifying because the inclusion of a legal analysis in answering this question will help create an atmosphere affirming the relevance of democratic standards and processes to the issue of national security and the threat posed by nuclear weapons.

In this regard, Professor Miller's lucid presentation and probing analysis is premised upon an important historic fact — that the most fundamental challenges to established governmental policies have depended upon prior expressions of citizen concern. Traditionally, a legal analysis has been relevant to the scale and grounds of such concern. Certainly, it should not be forgotten that in areas basic to democracy, civil liberties and civil rights, a sense of constitutional entitlement underlay and inspired the recourse to citizen activism which in turn subsequently produced an altered climate enabling adjustments in public

3. Miller, *Nuclear Weapons and Constitutional Law*, 7 NOVA L.J. 21 (1982).

policy and laws.

At this juncture in my comment, I would like to focus and expand upon two especially significant points made by Professor Miller that concern how nuclear weapons challenge our governing process: 1.) the abuse of state power; and 2.) the applicability of international law. For this author, the development, possession, and deployment of nuclear weapons and the government's willingness and readiness to use them has severely undercut some of the most basic traditions and structures of democratic society. This conclusion is derived from two mutually reinforcing circumstances.

The first of these circumstances concerns assumptions of absolute authority by our governmental leaders over the well-being of the citizenry without sufficient accountability in the area of national security. The authority of the President in the area of nuclear weapons policy gives that office unrestrained power over human destiny without an equivalent in human history - that is, the power to cause a global human apocalypse. Certainly, even the most despotic tyrant claiming to rule by divine right never wielded such power.

To say the least, the absolute nature of the power of the President in this area makes a mockery of our democratic standards and processes. Given the democratic traditions of this nation, it would be difficult to imagine a reasonably prudent citizen assenting to the grant of such awesome power to one person or one branch of government when the exercise of that power could spell unparalleled human death and destruction.

Furthermore, the very nature of nuclear weapons forces us to live constantly on the edge of war. Nuclear weapons technology is such that human extinction is only a few minutes away. This technology and the nuclear weapons policies that have evolved since 1945 compel our society to live in a permanent pre-war atmosphere, a permanent state of military mobilization to wage a nuclear conflict. It has been the conventional wisdom that the President as Commander-in-Chief only exercised his emergency battlefield decision-making power during wartime. Now, the President exercises power in "peacetime" that he could only exercise during a war. Consequently, the nuclear national security structure that has emerged over the past thirty-seven years has had the effect of erasing the distinction between the peacetime and wartime powers of the President which are so fundamental to the operation of democratic processes.

Whether the nuclear national security system constructed around deterrence gives rise to a nuclear war or not, that system has also caused the rise of a society based on secrecy and surveillance. To appreciate the incompatibility of the government's nuclear weapons policies with the idea of a democratic society, one need only look at the political repression and hysteria associated with the espionage issue of the 1950's. One justification offered at that time by the government for this repression was to prevent the "secret" of the atomic bomb from falling into the hands of a hostile foreign power. How absurd this justification now appears in light of the atomic bomb that was designed as a classroom exercise by a college student using publicly obtainable documents. Even still the government persists in withholding information with which citizens could rationally evaluate the effects and consequences of our nuclear weapons policies as well as engaging in secret surveillance of lawful political activities by the citizenry. The effectiveness of this repression can be evaluated by simply inquiring of the American public whether they are aware of the numerous occasions since 1945 when our foreign policy decision-makers seriously contemplated the threat of use or the use of nuclear weapons in a crisis situation.

The other circumstance which was touched upon briefly by Professor Miller, in arguing that democratic society is being seriously damaged by nuclear weapons, is that nuclear weapons cannot be reconciled with the basic principles of international law.

The prevalent belief among the general public as well as policy-makers is that nuclear weapons are legal under international law. The official position of the United States as found in its military manuals is the blanket assertion that a state may do whatever it is not expressly forbidden from doing. Therefore, the United States government argues that since international law has not generated a duly ratified treaty, there is no foundation for contending that nuclear weapons are illegal or prohibited.

However, the legality of nuclear weapons cannot be judged solely by the existence or non-existence of a treaty rule specifically prohibiting or restricting their use. Any reasonable analysis must take into consideration all the recognized sources of international law — treaties, custom, general principles of law, judicial decisions and the writing of qualified publicists. Of particular relevance in evaluating nuclear weapons are the many treaties and conventions which limit the use of weap-

ons in war; the fundamental distinction between combatant and non-combatant; and the principles of humanity including the prohibition of weapons and tactics that are especially cruel and cause unnecessary suffering. A review of these basic principles supports the conclusion that the threat or use of nuclear weapons pursuant to either a doctrine of massive retaliation, mutual assured destruction, counterforce, or limited nuclear war, is illegal under international law.

Restraints on the conduct of hostilities are traditionally not limited to those given explicit voice in specific treaty stipulations. Aware of the continuous evolution of war technology, the 1907 Hague Regulations contain a general yardstick intended exactly for situations where no specific treaty rule exists to prohibit a new type of weapon or tactic. In such cases, "the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience."⁴ Hence, this general rule, known as the Martens Clause, makes the principles of humanity and the dictates of public conscience obligatory by themselves, without the formulation of a treaty specifically prohibiting a new weapon.

Ever since the Declaration of St. Petersburg of 1868,⁵ the principles of humanity have been asserted as a legal constraint upon military necessity. The Declaration embodies the twin ground rules of the laws of war: that "the right to adopt means of injuring the enemy is not unlimited"⁶ and that "the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy."⁷

Another basic source of the laws of war is the Hague Conventions

4. 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 309 (L. Friedman ed. 1972). For a wider discussion of the Martens Clause see Fried, *The Electronic Battlefield and the Dictates of the Public Conscience*, REVUE BELGE DE DROIT INTERNATIONAL 431-54 (Feb. 1972).

5. Declaration Renouncing the Use in War of Certain Explosive Projectiles (1868) which appears in 1 THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note 4, at 192. See also 3 R. PHILLIMORE, INTERNATIONAL LAW 160-62 (3d ed. 1885); 1 AM. J. INT'L L. Supp. 95 (1907).

6. See 1 THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note 4.

7. *Id.*

of 1907,⁸ particularly the Regulations embodied in Hague Convention IV. These Regulations are recognized as "the foundation stones of modern law of armed conflict."⁹ A fundamental tenet of these Regulations is the prohibition of weapons and tactics which cause wanton or indiscriminate destruction.

It is clear that the use of nuclear weapons in populated areas would result in the indiscriminate and massive slaughter of civilians. Moreover, even if nuclear weapons were used only against an enemy's strategic nuclear forces, the annihilation and extermination of the civilian population would be an inevitable by-product. As the experiences of Hiroshima and Nagasaki amply demonstrate, the effects of nuclear weapons because of their very awesome nature, cannot be limited to military targets. Consequently, the use of nuclear weapons would result in the commission of war crimes on an enormous scale.

The effect of radioactive fallout can also be considered the functional equivalent of the effects of the use of poison gas or bacteriological weapon. The Hague Declaration (IV, 2) concerning Asphyxiating Gases of 1899¹⁰ prohibits projectiles whose sole purpose is the diffusion of asphyxiating gases and the Geneva Gas Protocol of 1925¹¹ prohibits the use of both poisonous gases and bacteriological weapons. A strong case can be made that human exposure to radiation or radioactive fallout brings nuclear weapons within the ambit of these international conventions. While it is true that nuclear weapons do not produce the bacteria, fungi or living organisms normally associated with bacteriological weapons, it is indisputable that nuclear weapons do alter the chemical structure of humans, plants and animals, as well as producing long-

8. Convention (IV) Respecting The Laws and Customs of War on Land, *opened for signature* Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 in THE LAWS OF ARMED CONFLICT 57-92 (D. Schindler & J. Toman eds. 1973). *See also* 36 Stat. 2277, T.S. No. 539, 1 Bevans 631.

9. DEPARTMENT OF THE AIR FORCE, PAMPHLET NO. 110-31, INTERNATIONAL LAW — THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS ch. 1, at 1 & ch. 5, at 1 (Washington, D.C. 1976).

10. Declaration Concerning Asphyxiating Gases (1899) in THE LAWS OF ARMED CONFLICT, *supra* note 8, at 99-101. *See also* 1 AM. J. INT'L L. Supp. 129, 155 (1907).

11. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare in THE LAWS OF ARMED CONFLICT, *supra* note 8, at 109-20. (1925) *See also*, 26 U.S.T. 571, T.I.A.S. No. 8061, 94 L.N.S.T. 65, 14 I.L.M. 49 (1975).

term genetic effects.

Certainly, both bacteriological and nuclear weapons are potentially weapons of mass destruction with an unprecedented capability to destroy the physical integrity of the planet and to threaten our existence as a species. If the conscience of the international legal community finds the scale of potential effects produced by the use of bacteriological weapons inherently objectionable, then it necessarily follows that the prohibition of their use should be extended to nuclear weapons. In view of the similar potential of each type of weapon for far-reaching destruction, it would be difficult to grasp the legal or moral basis for condemning one, but tolerating the other.

Flowing logically from the requirement that weapons must be used selectively and only against military targets, is the commitment to protect civilians and the elementary distinction between combatants and non-combatants. The principle that civilian populations can never be regarded as military objects is, in fact, "at the very heart of the laws of war."¹² Without the element of discrimination between military and non-military targets, the fundamental distinction between combatants and non-combatants becomes meaningless. Today, the use of nuclear weapons pursuant to either the doctrines of mutual assured destruction, counterforce, or limited nuclear war would result in the indiscriminate and massive slaughter of civilian populations. To recognize the legality of nuclear weapons, given their capacity to terrorize and destroy a civilian population, would be to eliminate virtually the entire thrust and significance of the laws of war.

The universally accepted Geneva Conventions of 1949 reaffirm the distinction between combatant and non-combatant. In particular, "Convention (IV) relative to the Protection of Civilian Persons in Time of War"¹³ imposes additional detailed obligations on all belligerents to ensure the essential requirements for the health, safety and sustenance of the civilian population. Given the evidence developed by doctors and

12. R. FALK, L. MEYROWITZ, & J. SANDERSON, NUCLEAR WEAPONS AND INTERNATIONAL LAW 30 (Occasional Paper No. 10, World Order Studies Program, Center of International Studies, Princeton University (1981)). For a further discussion of this point see VI *The Collected Papers of John Bassett Moore*, 153 (Yale ed. 1944).

13. Convention (IV) Relative to the Protection of Civilian Persons in Time of War (1949), in THE LAWS OF ARMED CONFLICT, *supra* note 8, at 417-512. See also 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

scientists as to the medical and environmental consequences of nuclear weapons, it is clear that it would be impossible under conditions of nuclear war to carry out the obligations of the Geneva Conventions, just as it would also be impossible to live up to the dictates of the Hague Conventions — both of which aim at preserving the minimum requirements for the continued survivability and viability of all societies involved in armed conflict.

Complementing the distinction between combatants and noncombatants is the equally important principle that the international destruction of a group of people because of their race, religion or nationality constitutes a crime under international law. This legal innovation, which is embodied in the Nuremberg Principles¹⁴ and underlies the Genocide Convention of 1948,¹⁵ further extended the “principles of humanity” which had earlier been used to determine the legality or illegality of specific weapons.

The deaths resulting from an all-out nuclear exchange between the United States and the Soviet Union are estimated, conservatively, at more than 300 million people. Obviously, the indiscriminate human slaughter resulting from a major nuclear war would dwarf even the awesome genocidal policies enacted by the Nazi government during World War II. Given the destructive power of nuclear weapons and their known radioactive effects, any large-scale use of nuclear weapons would produce consequences clearly contrary to the spirit, if not the letter, of the Nuremberg Principles and the Genocide Convention.

On the basis of these unquestioned principles of international law enumerated above, the United Nations has offered a legal interpretation of the status of nuclear weapons. In 1961, the General Assembly declared in Resolution 1653(XVI) that “any state using nuclear or thermonuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the law of humanity, and as

14. For the text of Principle VI of the Nuremberg Principles which makes punishable as an international crime “crimes against humanity,” see *THE LAWS OF ARMED CONFLICT*, *supra* note 8, at 701-02. See also Report of International Law Commission, 2nd Sess. 5 U.N. GAOR. Supp. (No. 12) at iii-22, U.N. Doc. A/13/16 (1950).

15. Convention on the Prevention and Punishment of the Crime of Genocide (1948), in *THE LAWS OF ARMED CONFLICT*, *supra* note 8, at 163-178. See also, 78 U.N.T.S. 277.

committing a crime against mankind and civilization.”¹⁶ That Resolution was reaffirmed in subsequent resolutions in 1978 and 1980.¹⁷ As evidenced by these actions of the General Assembly, a consensus has been clearly emerging that the use of nuclear weapons contradicts the fundamental humanitarian principles upon which the international law of war is founded.

Despite the clarity of the fundamental precepts of international law regarding nuclear weapons, there is an influential school of thought claiming that in an era of “total war” even the most fundamental rules can be disregarded in the name of military necessity. Ironically, this view of international law was urged in another context by some of the Nuremberg defendants and indignantly rejected by the International Tribunal.¹⁸ The Tribunal’s judgment warns that this “Nazi conception” of total war would destroy the validity of international law altogether. Ultimately, the legitimacy of such a view would exculpate Auschwitz. Military necessity cannot be allowed to justify barbarism.

Even though the laws of war were violated on numerous occasions during World War II by even the Allies, this is not sufficient reason to abandon the laws of war. Rather than ignoring the content of international law, the American legal community needs to restore respect for the limits on state sovereignty set by the laws of war, not validate past disrespect and criminality by cynical claims to the irrelevancy of international law. To that end, it is practical, not idealistic, to take international law seriously. We would be more secure as a people, not less, if our governmental leaders were to try to conform national policy to the minimal obligations of international law. To assume the legality of a weapon with the distinct capability to terrorize and to destroy an entire civilian population makes meaningless the entire effort to limit combat through the laws of war. Global “survivability” is so elemental that the prohibition against nuclear weapons can be reasonably inferred from the existing laws of war. To conclude differently would be to ignore the

16. G.A. Res. 1653, 16 U.N. GAOR Supp. (No. 17) at 4, U.N. Doc. A/5100 (1961).

17. Non-use of Nuclear Weapons and Prevention of Nuclear War, G.A. Res. 33/71-B, 33 U.N. GAOR Supp. (No. 45) at 48, U.N. Doc. A/33/45 (1978); G.A. Res. 35/152-0, 35 U.N. GAOR Supp. (No. 48) at 69, U.N. Doc. A/35/48 (1980).

18. For the text of the Final Judgment see, 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS 171 (1947).

barbaric and nefarious character of the use of nuclear weapons. As the laws of war embody the minimum demands of decency, exempting nuclear weapons from regulatory prohibition would be abandoning even this minimum standard.

In conclusion, we have reached a dramatic stage in our history as a nation where our foreign policy must be carried out within the restraints of constitutional and international law. The demand for an effective legal structure is not quixotic — it is an absolute requirement of survival. Accordingly, a legal challenge gives our courts an important opportunity to “check” the most dangerous of all possible excesses of government which threatens not only the very foundations of our society, but all humanity. Of course, neither legal argument nor legal tactic is alone going to make the significant difference, especially where, as here, they touch sensitively upon prevailing notions of national security. However, it should be remembered that constitutional and international legal principles proved relevant for citizens who sought to question the legality of American policies in Vietnam. The strength of these principles as constraints upon the war-making power of the President cannot be measured by the extent of the adherence on the part of the government alone. The assimilation and acceptance of these constraints at the level of conventional legal wisdom may influence the choice of tactics and policies at official decision-making levels and eventually build support for nuclear disarmament initiatives and a less militarized conception of national security. If we are to protect humanity from drifting further toward nuclear catastrophe, then we in the legal community must expose the incompatibility of nuclear weapons with all the values that the Constitution obligates us to preserve. At stake is a democratic society and, indeed, life itself.

International Law as Law of the Land: Another Constitutional Constraint on Use of Nuclear Weapons.

Martin Feinrider*

Introduction

Concern now focuses on the threat to humankind posed by nuclear weapons to an extent not seen since the days of the Ban-the-Bomb movement of the 1950s.¹ During the past several years, millions of people have taken to the streets in North America and Europe to express this concern.² Now, in the United States, physicians, scientists and lawyers are banding together in their own professional organizations to concentrate energies and expertise on this, the greatest problem of our age.³

As part of the legal community's effort to address issues presented by nuclear weapons,⁴ Professor Arthur S. Miller has written a thought-

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1. "Concern for the risks of nuclear proliferation (and for the underlying risk of nuclear war) is the beginning of wisdom." Farley, *Nuclear Proliferation*, in SETTING NATIONAL PRIORITIES: THE NEXT TEN YEARS 129, 165 (H. Owen & C. L. Schultze eds. 1976).

During November 1982 elections, Nuclear Freeze proposals were approved in 9 out of 10 state referenda and 27 out of 29 city and county referenda. Union of Concerned Scientists, November 11th Convocation Update, No. 8 (Nov. 5, 1982).

2. See generally Butterfield, *Anatomy of the Nuclear Protest*, N.Y. Times, July 11, 1982, § 6 (Magazine), at 14.

3. E.g., Physicians for Social Responsibility, the Union of Concerned Scientists, the Lawyers' Alliance for Nuclear Arms Control, and the New York-based Lawyers' Committee on Nuclear Policy.

4. During the 1982-83 academic year symposia or law review issues dedicated to examination of legal questions raised by nuclear weaponry have been or will be pro-

ful and thought-provoking essay exploring, in a preliminary way, constitutional considerations relevant to American nuclear weapons strategy.⁶ In the process of examining implications of the President's Article II responsibilities, Professor Miller asks, "is international law a part of the corpus of laws that the President must faithfully execute?"⁸ The answer is, most assuredly, yes.⁷

International law is part of the law of the United States. It binds the United States through its constitutional incorporation into domestic law, and also in its own right, as a self-contained legal system functioning independently of municipal law mechanisms of implementation and enforcement. Substantively, international law binding upon the United States already prohibits the aggressive threat or use of nuclear weapons⁸ and by treaty makes illegal a significant number of other uses of nuclear weapons.⁹ Additionally there are other evolving international law limitations and prohibitions relevant to nuclear weapons,¹⁰ and, as they crystallize, they will similarly constrain United States nuclear options. International law thus affects the legality of United States nu-

duced at Brooklyn Law School, Georgetown University Law School, McGill University Law School, Nova University Law Center, Harvard Law School, and the Association of the Bar of the City of New York. Additionally, at least 37 law schools held events coinciding with November 11, 1982 Veterans' Day anti-nuclear activities cosponsored by the Union of Concerned Scientists, Physicians for Social Responsibility, and the Lawyers' Alliance for Nuclear Arms Control.

5. See Miller, *Nuclear Weapons and Constitutional Law*, 7 NOVA L.J. 21 (1982).

6. *Id.* at 33.

7. Paust, *The Seizure and Recovery of the Mayaguez*, 85 YALE L.J. 774, 803 n.131 (1976) ("the President is required to execute treaty and customary obligations faithfully both at home and abroad"). See Paust, *Is the President Bound by the Supreme Law of the Land?—Foreign Affairs and National Security Reexamined*, 9 HASTINGS CONST. L.Q. ____ (forthcoming 1982). *Contra*, L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 221-22 (1972) ("the Constitution does not forbid the President (or the Congress) to violate international law"). For a well-reasoned critique of Henkin's thesis, however, see Paust, 9 HASTINGS CONST. L. Q., *supra*, at _____. For an examination of domestic law implications for the United Kingdom of the international illegality of nuclear weapons see Background Paper, *Nuclear Weapons and the Law*, 5 ST. RESEARCH BULL. (No. 31) 170 (1982).

8. U.N. CHARTER art. 2, para. 4. See *infra* note 55 and accompanying text.

9. See *infra* notes 33-41 and accompanying text.

10. See *infra* notes 43-80 and accompanying text.

clear strategy directly and as another dimension of the constitutional restraints outlined by Professor Miller.

I. International Law as Law of the Land: An Historical Overview

International law was part of eighteenth century English common law received into American law.¹¹ State courts applied it prior to adoption of the Constitution,¹² and it was thoroughly familiar to partici-

11. One finds support for this proposition in the writings of that era's foremost legal scholars, Blackstone and Lord Mansfield among them, "[W]here the individuals of any state violate [the Law of Nations], it is then the interest *as well as the duty* of the government under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained." 4 W. BLACKSTONE, COMMENTARIES 68 (1st ed. 1765-69) (emphasis added). For other examples of Blackstone's writing on this subject, see 1 W. BLACKSTONE, COMMENTARIES 75, 263-64 (1st ed. 1765-69); 3 W. BLACKSTONE, COMMENTARIES 69, 108 (1st ed. 1765-69); 4 W. BLACKSTONE, COMMENTARIES 67-73 (1st ed. 1765-69).

Lord Mansfield wrote extensively and authoritatively on this subject. *See, e.g.,* Luke v. Lyde, 97 Eng. Rep. 614, 617, 2 Burr. 882, 887 (K.B. 1759); Lindo v. Rodney, in LeCaux v. Eden, 99 Eng. Rep. 375, 385, 2 Doug. 594, 613 (1782).

See also the writing of Chief Justice Holt in Mogadara v. Holt, 89 Eng. Rep. 597-98, 1 Show. K.B. 317-19 (K.B. 1691); and the writing of Lord Stowell in The Maria, 165 Eng. Rep. 199, 1 C. Rob 340, 350 (Adm. 1799); and The Recovery, 165 Eng. Rep. 955, 958, 6 C. Rob. 341, 348 (Adm. 1807) ("this is a Court of the Law of Nations, though sitting here under the authority of the King of Great Britain.").

The Act of Anne of 1708 recognized that arrest of an ambassador pursuant to the suit of creditors was "contrary of the Law of Nations" and proceeded to avoid all such suits. Blackstone wrote that the Act was "not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world." 4 W. BLACKSTONE, COMMENTARIES 67 (1st ed. 1765-69). Lord Chancellor Talbot, in Barbuits Case in Chancery, 25 Eng. Rep. 777, 777 (Ch. 1735), wrote that the Act was "only declaratory of the antient universal *jus gentium*," and Lord Mansfield agreed, observing that the Act of Anne did not vary from international law because "[t]his privilege of foreign ministers . . . depends upon the law of nations," Triquet v. Bath, 97 Eng. Rep. 936, 937, 3 Burr. 1478, 1480 (K.B. 1764).

See generally Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, especially at 33 (1952) ("the Law of Nations was part of the law of England").

12. *E.g.,* Republica v. DeLongschamps, 1 U.S. (1 Dall.) 111 (Pa. Oy. & Term. 1784). "The Law of nations. . . , in its fullest extent, is a part of the law of this state."

pants in the Constitutional Convention.¹³ The Framers not only knew common law writings upon the subject, but were also well schooled, as was normal for educated men of their times, in the treatises of such great international law scholars as Grotius, Pufendorf, and Vattel.¹⁴

What little controversy concerning international law existed during the Constitutional Convention came from the inevitable intertwining of its incorporation with the difficulties of dividing powers between national and state authorities, and between the various branches of the proposed national government.¹⁵ The Constitution finally assigned exclusive responsibility for international relations to the federal government, divided it among the three branches, and specified that, in addition to the Constitution itself and federal statutes, "all Treaties made, or which shall be made, . . . shall be the supreme law of the land."¹⁶

Id. at 116.

13. See, e.g., THE FEDERALIST No. 3, at 15 (J. Jay) (Bourne ed. 1947). THE FEDERALIST No. 80, at 112, 114 (A. Hamilton) (Bourne ed. 1947); No. 83, at 144 (A. Hamilton) (Bourne ed. 1947); No. 82 (A. Hamilton) (Bourne ed. 1947). See also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 451 n.12 (1964) (White, J., dissenting); W. SOLBERG, THE FEDERAL CONVENTION AND THE FORMATION OF THE UNION OF THE AMERICAN STATES (1979). The participants in the Convention had a knowledge of contemporary legal thought. . . . It was axiomatic among them that the Law of Nations, applicable to individuals and to states was an integral part of the law which they administered or practiced. . . . Whenever in terms or by implication they spoke or wrote with reference to Law of Nations, they were indulging no mere flight of hopeful rhetoric. . . .

Dickenson, *supra* note 11, at 35-36.

14. Dickenson, *supra* note 11, at 35. See also E. DUMBAULD, THOMAS JEFFERSON AND THE LAW 33 (1978); W. SOLBERG, *supra* note 13, at xxx.

15. See, e.g., THE FEDERALIST No. 3, at 15 (J. Jay) (J. Cooke ed. 1977); THE FEDERALIST, No. 80, at 536 (A. Hamilton) (J. Cooke ed. 1977). See M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 91-123 (1918). See also Dickenson, *supra* note 11, at 26-56.

16. U.S. CONST. art VI, cl. 2. Additionally, the Constitution provides that the President

shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; . . . shall nominate, and by and with the Advise and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls. . . . [art. II, § 2, cl. 2;] shall receive Ambassadors and other public Ministers. . . . [art. II, § 3; and] shall be Commander in Chief of the Army and Navy of

Chief Justice John Marshall little doubted that all international law, no matter what its source, had been incorporated into the law of the United States.¹⁷ American judicial decisions of the last 190 years generally confirm Marshall's understanding of the place of the law of nations in American law.¹⁸ The simplicity and clarity of early court

the United States and of the Militia of the Several States. . . . [art. II, § 2, cl. 1].

[Congress has the power to] provide for the common Defense. . . . [art. I, § 8, cl. 1;] regulate Commerce with foreign Nations. . . . [art. I, § 8, cl. 3;] define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations. . . . [art. I, § 8, cl. 10;] declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water. . . . [art. I, § 8, cl. 11;] raise and support Armies. . . . [art. I, § 8, cl. 12;] provide and maintain a navy. . . . [art. I, § 8, cl. 13; and] make Rules for the Government and Regulation of the land and naval Forces [art. I, § 8, cl. 14].

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority;—to all cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to controversies to which the United States shall be a Party;— . . . to Controversies . . . between a State and the Citizens of another State;— . . . and foreign States, Citizens or Subjects. . . . [art. III, § 2, cl. 1]. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. [art. III, § 2, cl. 2].

17. "Marshall accepted the binding force of international law upon courts of the United States with no apparent difficulty. . . ." B. ZIEGLER, *THE INTERNATIONAL LAW OF JOHN MARSHALL* 5 (1939). See, e.g., the following decisions by Marshall: *The Antelope*, 23 U.S. (10 Wheat.) 66, 120 (1825) ("[T]he law of nations . . . which has received the assent of all must be the law of all. . . ."); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) ("Until such an act be passed, the court is bound by the law of nations, which is a part of the law of the land. . . ."); *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 277 (1808) ("[T]he law of nations is the law of all tribunals. . . ."); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . .").

18. See, e.g., *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953); *Skiriotes v. Florida*, 313 U.S. 69, 72 (1941); *Kansas v. Colorado*, 206 U.S. 46, 97 (1907); *The Paquete Habana*, 175 U.S. 677, 700 (1900); *Hilton v. Guyot*, 159 U.S. 113, 163 (1895); *Tag v. Rogers*, 267 F.2d 664, 666 (D.C. Cir. 1959); *The Lusitania*, 251 F. 715, 732 (S.D.N.Y. 1915); *The Appam*, 234 F. 389, 400 (E.D. Va. 1916); *Fernandez v. Wilkinson*, 505 F. Supp. 787, 795 (D. Kan. 1980); *United States v. Enger*, 472 F. Supp. 490,

decisions, however, has been lost as the question of the domestic role of the law of nations became increasingly complicated by other legal issues, including the allocation of competence between national and state governments,¹⁹ the political question doctrine,²⁰ the self-execution doctrine,²¹ and the division of foreign affairs powers among the President and the houses of Congress.²²

The general principle that international law is part of United States law, however, has survived even the chauvinism of manifest destiny, the banality of American legal positivism, and the arrogance of power that came with American twentieth century global hegemony. Unfortunately, most of the present generation of American lawyers and legal scholars fail to understand the role of international law within

504 (D.N.J. 1978); *Sociedad Nacional de Marineros de Honduras v. McCulloch*, 201 F. Supp. 82, 80 (D.D.C. 1962). *See also* Paust, *Litigating Human Rights in U.S. Courts*, 4 Hous. J. INT'L L. 137 (1981).

19. *See, e.g.*, *Holmes v. Jenninson*, 39 U.S. (14 Pet.) 540 (1840) (where despite the absence of an effective federal extradition treaty the governor of Vermont allowed a Canadian resident to be extradited to Canada from Vermont; the Court refused to hear the case because the Justices were equally divided on the meaning of the "Agreement Clause," U.S. CONST. art. I, § 10); *Missouri v. Holland*, 252 U.S. 416 (1920). *See generally*, L. HENKIN, *supra* note 7, at 227-49.

20. *See generally*, L. HENKIN, *supra* note 7, at 208-16; Gordon, *American Courts, International Law and "Political Questions" Which Touch Foreign Relations*, 14 INT'L L. 297 (1980); Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). *See, e.g.*, *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) ("[C]onduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—the political—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.").

21. *See, e.g.*, *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829); *Sei Fujii v. State*, 38 Cal. 2d 718, 242 P.2d 617 (1952). *See generally* L. HENKIN, *supra* note 7, at 156-66. For a discussion of self-execution in the context of human rights treaties, see Feinrider, *Extraterritorial Abductions: A Newly Developing International Standard*, 14 AKRON L. REV. 27, 45 n.121 (1980).

22. "[T]he constitution is especially inarticulate in allocating foreign affairs powers; . . . a particular power can with equal logic and fair constitutional reading be claimed for the president or for Congress. . . ." L. HENKIN, *supra* note 7, at 90. *See generally* T. FRANCK & E. WEISBAND, *FOREIGN POLICY BY CONGRESS* 135-62 (1979); Feinrider, *America's Oil Pledges to Israel: Illegal But Binding Executive Agreements*, 13 N.Y.U. J. INT'L L. & POL. 525, 537-49 (1981).

American law; unlike their predecessors and members of the legal profession of other nations, they rarely study it.²³ The significance of international law is lost upon this generation for whom American international political, economic and military power is a ready substitute. Nevertheless, as the world grows smaller and American dominance grows weaker, the relevance of international law may be learned anew.

II. The International Dimension

International law is a law of consent and consensus. The existence of consent given by sovereign nations is demonstrated by treaty, custom and general principle—the primary sources of international law.²⁴ In the era of the United Nations Charter, when multilateral treaties are common,²⁵ international debate regular, and global communication rapid, the process of achieving agreement creating international law is

23. "[I]t is really only in the past two decades that doubt has been cast on the propriety of judicial invocation of international legal norms." Gordon, *supra* note 20, at 309.

24. The STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, generally recognized as the most authoritative contemporary statement of the sources of international law, directs that the world court shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, at art. 38(1). Article 59 of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE provides that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case."

A recent International Court of Justice case (Nuclear Tests Case—Australia v. France, 1974) and recent state practice (*see infra* note 41), suggest that even unilateral statements by national representatives may be sources of international obligations.

25. During the first half of the 1960's 6,886 treaties entered into force. P. ROHN, TREATY PROFILES 57 (1976). One hundred forty-eight of them were multilateral. Gamble, *Reservations to Multilateral Treaties: A Macroscopic View of State Practice*, 74 AM. J. INT'L L. 372 (1980).

potentially quicker than in times past.²⁶ Further, the substance of international law is far greater than in times gone by, reaching nearly all areas of concern to the law.²⁷ At a time when the globe continues to shrink daily, respect for and adherence to international law is the indisputable prerequisite for international peace and security.

International law is explored and relied upon not only in international tribunals and fora, but also in the courts and legislative chambers of the many nations of the world. This is a function of the fact that at its present state of development international law still, for the most part, relies upon municipal authorities for its enforcement. This, however, does not mean that municipal determinations of the content of international law define international obligations. To the contrary, international law is ultimately determined according to its own sources.²⁸ If it were otherwise, a law of nations would be an impossibility, drowned in the parochial and often self-serving views of the world's nations.

If a rule of international law exists, it is binding upon the United States. International law, of course, protects against easy imposition of obligations upon a nation without its assent. Once that assent is given, however, or once a peremptory norm is created, binding international obligations exist.²⁹

26. See Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law*, 5 INDIAN J. INT'L L. 23 (1965).

27. International agreements now deal with subjects as diverse as human rights, exploration of the moon, uses of outer space, patents, trade and tariffs, settlement of boundary disputes, arms limitation, protection of non-combatants and civilians during time of international and non-international armed conflict, preservation of the environment, exploration of Antarctica, assignment of radio broadcast frequencies, etc.

28. This is not to prejudge whether any particular norm has risen to the level of a rule of international law, nor to minimize the role of the United States as an important actor upon the global scene whose conduct is watched carefully for evidence of relevant state practice by students of international law.

29. Treaties to which the United States is a party, according to the principle *pacta sunt servanda*, are binding. Though subsequent inconsistent United States legislation may negate the incorporation of treaties or customary rules of international law into national law under the last in time doctrine, domestic law may likewise be negated by subsequent inconsistent treaties or customs. RESTATEMENT SECOND OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 135(1) (Tent. Draft No. 1, 1980) (and Reporter's notes 1 & 6); see Murphy, *Customary International Law in U.S. Jurisprudence—A Comment on Draft Restatement II*, INT'L PRACTITIONER'S NOTEBOOK (No.

The Judgment at Nuremberg demonstrated the extent to which the international community ascribes individual liability to government officials for breaches of serious international obligations. As a party to the charter which created the Nuremberg Tribunal, the United States committed itself to the international rule of law, a commitment reaffirmed by its ratification of the United Nations charter. Certainly the rule of international law is as binding upon the United States and its government officials as it was binding upon Nazi Germany and the German leaders brought to trial by the Allied Powers.

III. The Limits on and Potential of Law

Before proceeding to an analysis of international legal norms concerning nuclear weaponry, we should first consider of what utility international law can be in the face of nuclear weapons; that is, how might international law affect future use or plans for future use of nuclear weapons? Though demonstration of the illegality of nuclear weapons will not in itself determine the nuclear weapons question or prevent policy planners from detailing conditions of future nuclear weapons use, doctrinal inquiry is far from mere self-delusion.

International law, it is true, has generally not had enforcement mechanisms other than the domestic machinery provided by nation-states, its traditional subjects. Future international criminal law punishment of nuclear weapons users, however, could occur, based on the Nuremberg precedent, but even this would not ensure the efficacy of international legal norms. No law, no matter what its mechanism for enforcement, can prevent illegal behavior other than by threat of negative after-the-fact consequences. The need for *post facto* punishment reflects the inherent inadequacy of all law as an absolute deterrent to proscribed behavior. This would be as true of the international law basis of a Nuremberg-type trial of those responsible for nuclear aggression as it is of the state penal code under which a murderer is brought before some local trial court. Moreover, the nuclear apocalypse, should it ever come to pass, might well preempt forever all possibility of after-

20) 17 (Oct. 1982). No matter what the domestic effect of subsequent legislation, however, the international obligations of the United States emanating from treaty or custom remain in force.

the-fact legal consequences, making resort to law futile.

All law, however, receives whatever power it has, not primarily from its threatened enforcement, but from the normative consensus underlying it. In a democracy, according to theory, policy-makers and members of the polity alike share in this consensus;³⁰ in an authoritarian or totalitarian society the leadership can only retain power by not straying *too far* from the views of those below. Consensus and law, through an interactive process, help create and strengthen each other, thus effectively shaping behavior. Despite the elitist assumptions normally associated with governance and the present nation-state system, consensus and law—even on the international level—can be built from the bottom up. In fact, given the failure of the world's leaders to respond effectively to the challenge of nuclear weapons, we may have no choice but to rely on the efforts and consciousness of the people of the United States, the Soviet Union, and all other nations.³¹ International law, and its attempted implementation through domestic legal systems which incorporate it, can effectively assist the popular movement against nuclear weapons.

International law can help limit or even prevent future use of nuclear weapons by defining considerations of policy-makers, swaying public dialogue, providing ammunition for anti-nuclear populist movements, and demonstrating to all willing to listen the complete incompatibility of nuclear weaponry with virtually the entire thrust of the post-World War II effort to create structures and norms supportive of international peace and security. Should these ends be accomplished, they could well become means to the creation of law, and no small feat will have been done. Enforcement of international proscriptions of nuclear weaponry may then prove unnecessary in view of a popular anti-nuclear consensus globally reached.

30. See generally Paust, *The Concept of Norm: Toward a Better Understanding of Content, Authority, and Constitutional Choice*, 53 *TEMPLE L. Q.* 226 (1980). For an interesting view of the implications of nuclear weapons for democracy, see Falk, *Nuclear Weapons and the End of Democracy*, 2 *PRAXIS INT'L* 1 (1982).

31. But cf. Hoffman, *International Law and the Control of Force*, in *THE RELEVANCE OF INTERNATIONAL LAW: ESSAYS IN HONOR OF LEO GROSS* 21 (K. Deutsch & S. Hoffman eds. 1968).

IV. International Law and Nuclear Weapons

Analysis of the international legality of nuclear weapons must take into account the complexities of reality. Nothing in fact or law justifies the *a priori* lumping together, into one neat conceptual category, of all types of nuclear weapons and all their possible uses. Defensive surgical use of a low-yield clean tactical weapon against a clearly military target in an isolated geographical region with low population density, for example, must be viewed, initially at least, as different from strategic first-use of a multi-megaton dirty bomb against a major urban population center.³² A complex analytic task must be undertaken before we can conclude that all uses and types of nuclear weapons are subject to the same proscriptive norm of international law. Here, the goal is simply to make a small contribution toward accomplishment of that task.

At present no treaty explicitly prohibits all use of nuclear weapons. It is also probably correct to say that, as yet, no rule of customary international law prohibits all use of nuclear weapons. Nevertheless, a variety of treaties, evidencing global disapprobation, explicitly outlaw or limit a significant number of nuclear weapon uses.³³

By treaty, international law prohibits nuclear weapons *deployment* or *use* in Antarctica,³⁴ Latin America,³⁵ earth orbit, outer space and on

32. See G. SCHWARZENBERGER, INTERNATIONAL LAW AND ORDER 185-218 (1971). At a recent conference on nuclear weapons held at Brooklyn Law School on September 25, 1982, Professor John Norton Moore, a noted conservative scholar of international law, was forced to admit that the legality of nuclear weapons *per se* remains an open question. Nevertheless, he challenged seriously the analysis of those arguing for illegality by raising hypothetically the odd *de minimus* case. See Moore, *Remarks*, 9 BROOKLYN J. INT'L L.—(forthcoming 1983). Though his hypothetical did not effectively undermine the basic argument for illegality of strategic use of nuclear weapons, it raised questions concerning less dramatic nuclear uses that must be addressed by any purportedly comprehensive analysis. Intellectual honesty and rigor require no less.

For an early attempt at doctrinal analysis of nuclear legality in light of the variety of nuclear weapons and their possible uses, see G. SCHWARZENBERGER, THE LEGALITY OF NUCLEAR WEAPONS (1958).

33. See R. SIVARD, WORLD MILITARY and SOCIAL EXPENDITURES 13 (1981), quoted in BRIEFING MANUAL OF THE UNION OF CONCERNED SCIENTISTS, SOLUTIONS TO THE NUCLEAR ARMS RACE 59-68 (1982).

34. Antarctic Treaty, signed Dec. 1, 1959, entered into force June 23, 1961, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71 (ratified, as of Nov. 15, 1982, by 26

celestial bodies,³⁶ and *deployment* on the seabed beyond the twelve-mile limit of national territorial seas.³⁷ Further, more than one hundred nations have subjected themselves to a rule of international law prohibiting possessors of nuclear weapons and nuclear weapons technology from *transferring* such weapons or technology to non-nuclear weapons nations.³⁸ Further yet, states may not even *test* nuclear weapons in outer space, under water or within the earth's atmosphere.³⁹ In addition, the United States and the Soviet Union have concluded a series of bilateral agreements designed specifically to reduce the risk of accidental or avoidable military use of nuclear weapons during any confrontation between the two superpowers,⁴⁰ and also to limit the number of

states).

35. Treaty of Tlatelolco (Latin American Nuclear Free Zone Treaty), Feb. 14, 1967, 634 U.N.T.S. 281 (ratified, as of Nov. 15, 1982, by 24 states; Argentina and Cuba are the only Latin American states not party to this treaty, and Argentina has signed but not yet ratified it).

36. Outer Space Treaty, *signed* Jan. 27, 1967, *entered into force* Oct. 10, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 (ratified, as of Nov. 15, 1982, by 81 states).

37. Seabed Treaty, *signed* Feb. 11, 1971, *entered into force* June 18, 1972, 23 U.S.T. 701, T.I.A.S. No. 7337 (ratified, as of Nov. 15, 1982, by 70 states).

38. Non-Proliferation Treaty, *signed* July 1, 1968, *entered into force* March 5, 1970, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161 (ratified, as of Nov. 15, 1982, by 119 states: bans transfer of nuclear weapons technology to non-nuclear weapons states, and requires controls on "peaceful nuclear facilities" to prevent their being turned to weapons production).

39. Partial Test Ban Treaty, *signed* Aug. 5, 1963, *entered into force* Oct. 10, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433 (ratified, as of Nov. 15, 1982, by 110 states).

The United States and the Soviet Union have concluded agreements limiting underground testing of nuclear weapons but have not yet ratified them. *See*, Underground Nuclear Weapon Test Treaty, *signed* July 3, 1974, U.S. DEP'T OF STATE, PRESS RELEASE No. 281 (July 3, 1974), *reprinted in* 13 INT'L LEGAL MATERIALS 906 (1974), and Peaceful Nuclear Explosions Treaty, *signed* May 28, 1976, U.S. ARMS CONTROL & DISARMAMENT AGENCY, PUB. NO. 87 (May 1976), *reprinted in* 15 INT'L LEGAL MATERIALS 891 (1976). Neither treaty has yet been ratified.

40. *See* Hot Line Agreement, *signed and entered into force* June 20, 1963, 14 U.S.T. 825, T.I.A.S. No. 5362, 472 U.N.T.S. 163; Hot Line Modernization Agreement, *signed and entered into force* Sept. 30, 1971, 22 U.S.T. 1598, T.I.A.S. No. 7187, 806 U.N.T.S. 402; Accidents Measures Agreement, *signed and entered into force* Sept. 30, 1971, 22 U.S.T. 1590, T.I.A.S. No. 7186, 807 U.N.T.S. 57; Prevention of Nuclear War Agreement, *signed and entered into force* June 22, 1973, 24 U.S.T. 1478, T.I.A.S. No. 7654 (agreements between the United States and the Soviet Union).

nuclear weapons allowed to each.⁴¹

In view of these substantial restrictions on nuclear weaponry explicitly imposed by conventional international law, what remains to be explored are ways in which uses of nuclear weapons still unaddressed by treaty may be subject to implicit legal constraints emanating from the structures and norms of international law generally. In the present context, the result of such examination leads to the conclusion that a rule of customary international law outlawing nuclear weapons *per se* is currently in the process of being created.⁴²

A. The Lawyer's Committee Analysis

In the most well-developed analysis currently available,⁴³ members of the Consultative Council of the Lawyers' Committee on Nuclear Policy rely heavily on the laws of war,⁴⁴ Nuremburg principles,⁴⁵ Gen-

41. Anti-Ballistic Missile Treaty, *signed* May 26, 1972, *entered into force* Oct. 23, 1973, 23 U.S.T. 3435, T.I.A.S. No. 7503, and Protocol of 1974, *signed* July 3, 1974, *entered into force* May 24, 1976, 27 U.S.T. 1645, T.I.A.S. No. 8276; Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Offensive Arms (SALT I), *signed* May 26, 1972, *entered into force* Oct. 3, 1972, 23 U.S.T. 3462, T.I.A.S. No. 7504, *expired* Oct. 2, 1977 (after expiration, the terms of this treaty were continued in force for the United States and the Soviet Union by means of Parallel Unilateral Policy Declarations); SALT II, *signed* June 18, 1979, *not yet ratified*, U.S. DEP'T OF STATE, PUB. 8984, SALT II AGREEMENT, VIENNA (Selected Documents No. 12A, June 18, 1979), *reprinted in* 18 INT'L LEGAL MATERIALS 1138 (1979) (agreements between the United States and the Soviet Union).

42. Law, as Professor Thomas Franck has pointed out, is "congealed politics." T. FRANCK AND M. MUNANSANGO, *THE NEW INTERNATIONAL ECONOMIC ORDER: INTERNATIONAL LAW IN THE MAKING?* 1 (UNITAR Policy and Efficacy Study No. 6, 1982). Unfortunately, the world social order has only begun the "congealing" necessary to overcome the cultural lag between norm and technology that has thus far retarded development of rules regulating the most awesome of humankind's technological 'achievements.' Examination of politics in the process of congealing, then, becomes incumbent upon those seeking to understand the ways in which international law does and can address the issues raised by nuclear weaponry.

43. See R. FALK, L. MEYROWITZ, & J. SANDERSON, *NUCLEAR WEAPONS AND INTERNATIONAL LAW* (Occasional Paper No. 10, World Order Studies Program, Center of International Studies, Princeton University (1981)). See also Meyrowitz, *Nuclear Weapons Policy: The New Tyranny*, 7 NOVA L.J. 93 (1982).

44. E.g., the St. Petersburg Declaration, (1868); the 1889 Hague Declaration Respecting Asphyxiating Gases; the Hague Conventions of 1907, arts. 22, 23(a) and

eral Assembly recommendations (resolutions),⁴⁶ and a policy analysis of international law. They convincingly argue international law now limiting war-making by nations equally applies to nuclear war-making, and "any threat or contemplated use of nuclear weapons is contrary to the dictates of international law, and constitutes a crime of state . . . [the continuation of which] should be enjoined by judicial bodies and opposed by citizens and nongovernmental organizations."⁴⁷ Elliot L. Meyrowitz, Vice-Chairperson of the Lawyers' Committee sets forth this analysis in greater detail elsewhere in this issue of Nova Law Journal,⁴⁸ thus obviating the need for lengthy discussion here.

On the basis of the Lawyers' Committee analysis we can conclude that international law prohibits, at a minimum, those uses and kinds of nuclear weapons violative of the binding principle of proportionality applicable to all warfare and weapons.⁴⁹ This general principle of humanitarian law requires that "[b]elligerents shall not inflict harm on their adversaries out of proportion with the object of warfare, which is to destroy or weaken the military strength of the enemy."⁵⁰ Proportional-

23(e) of the regulations annexed thereto and the famous "de Martens" preambular clause; the Treaty of Versailles (1919), art. 171; the Geneva Gas Protocol of 1925; the four Geneva Conventions of 1949; and, the 1977 Protocol on Humanitarian law Applicable to Armed Conflict, Additional to the Geneva Conventions of 1949. See R. FALK, L. MEYROWITZ & J. SANDERSON, *supra* note 43, at 21-33.

45. See R. FALK, L. MEYROWITZ & J. SANDERSON, *supra* note 43, at 63-71.

46. G.A. Res. 1380, 14 U.N. GAOR Supp. (No. 16) at 4, U.N. Doc. A/4354 (1959); G.A. Res. 1643, 16 U.N. GAOR Supp. (No. 17) at 34, U.N. Doc. A/5100 (1961); G.A. Res. 2162, 21 U.N. GAOR Supp. (No. 16) at 10, U.N. Doc. A/6316 (1966); G.A. Res. 2936, 27 U.N. GAOR Supp. (No. 30) at 5, U.N. Doc. A/8730 (1972); G.A. Res. 2849, 26 U.N. GAOR Supp. (No. 29) at 70, U.N. Doc. A/8429 (1971); G.A. Res. 3246, 29 U.N. GAOR Supp. (No. 31) at 87, U.N. Doc. A/9631 (1974); G.A. Res. 3154, 28 U.N. GAOR Supp. (No. 30) at 34, U.N. Doc. A/9030 (1973); G.A. Res. 35/152, 35 U.N. GAOR Supp. (No. 48) at 69, U.N. Doc. A/3548 (1980). See R. FALK, L. MEYROWITZ & J. SANDERSON, *supra* note 43, at 58-62.

47. R. FALK, L. MEYROWITZ & J. SANDERSON, *supra* note 43, at 78.

48. See Meyrowitz, *supra* note 43.

49. See R. FALK, L. MEYROWITZ & J. SANDERSON, *supra* note 43, at 23-26; Meyrowitz, *supra* note 43, at 93.

50. J. PICTET, THE PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 30 (undated; available from the International Committee of the Red Cross). See International Committee of the Red Cross, Some International Red Cross Conference Resolutions and ICRC Statements on the Protection of Civilian Population and on Weapons of

ity, and its correlate providing that “[b]elligerents do not have unlimited choice in the means of inflicting damage on the enemy,”⁵¹ have spawned three binding principles of humanitarian law proper to the rules of war:

- [(1)] [b]elligerents will leave non-combatants outside the area of operations and will refrain from attacking them deliberately[;]. . .
- [(2)] [a]ttacks are only legitimate when directed against military objectives, that is to say whose total or partial destruction would constitute a definite military advantage. . .[; and]
- [(3)] [w]eapons and methods of warfare likely to cause excessive suffering are prohibited.⁵²

Nuclear weapons, many of which have massive destructive capabilities, long-lasting environmental and genetic effects, and a unique capacity for indiscriminate devastation, are more likely than other weapons to violate proportionality and the three principles derived therefrom. To the extent that certain uses of nuclear weapons would violate these principles, international law, as it exists today, prohibits them.

B. Charter Restraints on Nuclear Weapons

Article 1 of the Charter of the United Nations, the preeminent international legal document of our time, makes clear that the *raison d'être* of the United Nations is, first and foremost, “to maintain international peace and security.”⁵³ The preamble of the Charter reminds us

Mass Destruction (August, 1981).

51. J. PICTET, *supra* note 50, at 32.

52. *Id.* at 52-55.

53. U.N. CHARTER art. 1. Article 1, in relevant part, provides;
The Purposes of the United Nations are:

(1) To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

(2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take

that the Organization was brought into being "to save succeeding generations from the scourge of war,"⁵⁴ and no scourge could be greater than the one threatened by military use of nuclear weapons.

The article 2(4) prohibition of aggressive war⁵⁵ forbids use of nuclear weapons as part of an aggressive war just as it forbids aggressive use of other weapons. Article 51, however, goes further and prohibits even certain defensive uses of nuclear weapons because of their unique capacity for mass destruction. The Charter recognizes the inherent sovereign right of self-defense against armed attack, yet it further provides that the right of self-defense will remain unimpaired by Charter obligations only "until the Security Council has taken measures necessary to maintain international peace and security."⁵⁶ Article 51 also requires

other appropriate measures to strengthen universal peace

54. U.N. CHARTER preamble. The preamble reads as follows:

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

to save succeeding generations from the scourge of war, which twice in our life-time has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in larger freedom,

AND FOR THESE ENDS

to practice tolerance and live together in peace with one another as good neighbours, and

to unite our strength to maintain international peace and security, and

to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and

to employ international machinery for the promotion of the economic and social advancement of all peoples,

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS.

55. U.N. CHARTER article 2, paragraph 4 reads as follows:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

56. U.N. CHARTER art. 51.

that self-defense measures taken before the Security Council becomes seized of a conflict "shall not in any way affect the authority and responsibility of the Security Council . . . to take at any time such action as it deems necessary in order to maintain or restore international peace and security."⁵⁷ This apparently further limits the number of situations in which nuclear weapons could lawfully be used. For example, a nuclear attack on New York City resulting in destruction of United Nations headquarters would, to say the least, affect negatively the authority and responsibility of the Security Council in violation of article 51. Similarly, nuclear incineration of Moscow or Washington, D.C., or the capital of any permanent or non-permanent member of the Security Council also would violate the letter and spirit of article 51.⁵⁸

The article 51 limited right to self-defense, and the rest of the United Nations Charter, thus tell us that though the authors of the Charter knew the article 2(4) prohibition of aggressive war would likely be violated, they also envisioned a bottom-line limitation on war-making in the name of self-defense: the peace-making and peace-restoring machinery of the United Nations must always remain available to serve the needs of humankind. The Charter, in article 2(3), explicitly imposes upon states the duty to respect this bottom line.⁵⁹ Any irreparable interference with the functioning or existence of international structures of peace would violate criminally the very object and pur-

Article 51, in full, provides that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

See also U.N. CHARTER article 2, paragraph 3 which requires that "all Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

57. U.N. CHARTER art. 51.

58. Is there anyone who would argue, should the analysis presented in the text be correct, that nations "merely" members of the General Assembly would remain legally unprotected against nuclear attack?

59. See U.N. Charter art. 2, para. 3, *supra* note 56.

pose of the United Nations Charter; cynicism concerning the likelihood of effective U.N. action would be no defense. No head of state could violate this international law bottom-line without having need to fear a Nuremberg-type trial.⁶⁰ It is inconceivable that the United States Constitution would allow the President to engage in nuclear crimes against the international structures of peace. Consequently, both international and United States domestic law prohibit at least strategic weapons aspects of United States "flexible response" strategy, which provides for escalating first-use of nuclear weapons in the event of Soviet conventional forces attacks in Europe.

C. The Human Rights/Natural Law Right to Survival

War is the ultimate, albeit irrational, act of sovereignty. It is therefore appropriate to look to international law restraints on sovereignty for possible limits on the ultimate act of war—nuclear attack. International human rights law may well serve as a fertile source for such limits on state nuclear war-making powers; human rights law has otherwise been responsible for the most significant limitations upon the sovereignty of states within the world order of the United Nations era.

Since the unanimous adoption by the General Assembly of the Universal Declaration of Human Rights in 1948,⁶¹ numerous treaties of a universal, regional or specialized character have established limitations on the ways in which a national government can (mis)treat its

60. Of course, if nuclear war occurs there may well be no survivors to conduct the trial.

61. Universal Declaration of Human Rights, G.A. Res. 271A, U.N. Doc. A/810, at 71 (1948). The Universal Declaration was originally intended as an aspirational statement establishing a "common standard of achievement" for humankind, *id.*; however, many now agree that the terms of the Declaration, or at least some of them have become binding customary international law. See, e.g., R. LILICH & F. NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 7 (1979); Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, in HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 22 (B.G. Ramcharan ed. 1979). See also *Montreal Statement of the Assembly for Human Rights* 2 (1968), reprinted in 9 J. INT'L COMM. JUR. 94, 95 (1968); Declaration of Teheran, Final Act of the International Conference on Human Rights 3, at 4, para. 2, U.N. Doc. A.Conf. 32/41; G.A. Res. 2442, 23 U.N. GAOR Supp. (No. 18) at 49, U.N. Doc. A/7218 (1968).

own citizenry.⁶² Over the last thirty years these treaties have been the subject of more than three hundred fifty separate acts of ratification, changing dramatically the very conceptualization of international law as a law only of nations.⁶³ Now, individuals too can be subjects of, and direct recipients of rights under international law. Inherent in this development has been recognition that at the heart of all government and law, whether on the international or municipal level, exists a core set of values and rights protecting humankind which emanates from natural law.⁶⁴

The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights both speak of the “*inherent dignity*”⁶⁵ of the human person and the “*inalienable* rights of all members of the human family.”⁶⁶ The Preamble to

62. E.g., International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, *entered into force* March 23, 1976, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) (ratified, as of Nov. 15, 1982, by 72 states); International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 19, 1966, *entered into force* Mar. 23, 1976, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966) (ratified, as of Nov. 15, 1982, by 75 states); [European] Convention for the Protection of Human Rights and Fundamental Freedoms, *signed* Nov. 4, 1950, *entered into force* Sept. 3, 1953, 213 U.N.T.S. 222 (ratified by all 21 members of the Council of Europe); American Convention on Human Rights, *signed* Nov. 22, 1969, *entered into force* July 18, 1978, 36 O.A.S. T.S. No. 1, O.A.S. Off. Rec. OEA/Ser. L/V/II.23 doc. rev. 2 (ratified, as of Nov. 15, 1982, by 17 states); International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, *entered into force* Jan. 4, 1969, 660 U.N.T.S. 195 (ratified, as of Nov. 15, 1982, by 117 states). For one view of the relationship between human rights and international law, see D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110 (1982).

63. The Vienna Convention on The Law of Treaties recognizes that *some* difference exists between international human rights treaties and other treaties. Vienna Convention on the Law of Treaties, art. 60(5), *opened for signature* May 27, 1969, *entered into force* Jan. 27, 1980, U.N. Conf. on Law of Treaties Off. Rec., 1st & 2d Sess., U.N. Doc. A/Conf./39/27 at 289. See Feinrider, *supra* note 21, at 43 n.116. The Vienna Convention has been ratified, as of Nov. 15, 1982, by 43 states; the United States has signed but not yet ratified it.

64. See *infra* notes 65-74 and accompanying text.

65. International Covenant on Civil and Political Rights, *supra* note 62, at preamble (emphasis added); International Covenant on Economic, Social and Cultural Rights, *supra* note 62, at preamble (emphasis added).

66. See *supra* note 65.

the International Convention on the Elimination of All Forms of Racial Discrimination states that the United Nations Charter "is based on the principles of the dignity and equality *inherent* in all human beings,"⁶⁷ and, repeating the language of the Universal Declaration, concludes "that all human beings are *born* free and equal in dignity and rights."⁶⁸ The American Convention on Human Rights recognizes that "the *essential* rights of man are not derived from one's being the national of a certain state, but are based upon the *attributes of the human personality*."⁶⁹ Language such as this indicates comprehension of a natural law basis for human rights,⁷⁰ and, when incorporated into treaties, evidences both the state practice and *opinio juris* necessary for creating

The common preambular language of the two covenants, in relevant part, reads as follows:

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights. . . .

67. International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 62, at preamble (emphasis added).

68. *Id.* (emphasis added).

69. American Convention on Human Rights, *supra* note 62, at preamble (emphasis added).

70. See R. FALK, HUMAN RIGHTS AND STATE SOVEREIGNTY 42-45 (1981). See also Fernandez v. Wilkinson, 505 F. Supp. 787, 796 (D. Kan. 1980) ("The development of international agreements containing human rights norms which purport to be binding . . . was a significant step in the transformation of natural rights into positive legal rights."), *aff'd on other grounds*, 654 F.2d 1382 (10th Cir. 1981), discussed in Note, *Custom and General Principles as Sources of International law in American Courts*, 82 COLUM. L. REV. 751, 773-74 (1982).

The language quoted in the text at notes 65-70 is, admittedly, preambular language. Article 31 of the Vienna Convention on The Law of Treaties, *supra* note 63, however, provides that a preamble is to be considered part of a treaty's text and is among the primary sources for treaty interpretation. Cf. Miller, *supra* note 5, at 27-29 (analysis regarding the substantive import of the preamble to the United States Constitution).

customary international law.⁷¹

Surely, if individuals have inherent and inalienable natural rights superior to the positive international law rights of sovereign states, then so does humankind, if only as holder of the aggregate of rights belonging to its individual members.⁷² The superiority of individual and collective natural rights over positive state rights only makes sense if individual and collective survival is assured. Individually and collectively, then, we all have the right not to have our survival threatened by states

71. To establish that a norm has become customary international law it is necessary to demonstrate the existence of a substantial number of states acting in conformity with the norm *and* that those states were in conformity because of a belief on their part that their behavior was required by law (*opinio juris*). Here, the norm is one providing that individuals have natural rights limiting the sovereign rights of states. The voluntary subordination of sovereign rights to human rights through the ratification of treaties, (*see supra* note 62) is state practice, and the preambular language of these treaties is clear evidence of *opinio juris*, that is, that the states ratifying them were motivated by the belief they were required to do so by certain preexisting "inherent," "inalienable" "essential" rights, "attributes of the human personality" belonging to beings "born free and equal in dignity and rights." *See supra* notes 65-69 and accompanying text.

The argument for illegality of nuclear weapons presented here should be distinguished from the one Eugene Rostow, Director of the United States Arms Control and Disarmament Agency, was presumably attempting to rebut at the Panel on Strategic Deterrence and Nuclear War of the 1982 Annual Meeting of the American Society of International Law. Rostow, in support of his argument that international law does not prohibit nuclear weapons *per se*, cited *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825). *See* Panel on Strategic Deterrence and Nuclear War (response of Eugene Rostow to question of Professor Burns Weston) in the Proceedings of the 76th Annual Meeting of the American Society of International Law (Apr. 22, 1982). In *The Antelope*, Chief Justice John Marshall wrote that though slavery was repugnant to natural law, its prohibition *had not yet been incorporated* into international law and therefore was not enforceable in United States courts. Here, the argument is that natural law, by way of custom, *has recently been incorporated* into international law and the natural law right to collective survival is therefore part of United States law. Nothing in *The Antelope* contradicts this assertion.

72. A similar argument to that presented in text, but more palatable to positivists, could be based on the universally recognized "right to life" and the Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, *entered into force* Jan. 12, 1951, 78 U.N.T.S. 277 (1951) (ratified, as of Nov. 15, 1982, by 84 states). Nuclear holocaust would be seen as murder and genocide multiplied, just as some have suggested that Nuremberg convictions for genocide were not based on ex-post-facto law because murder had long been a crime in all "civilized" nations.

acting out their sovereignty through use of nuclear weapons of mass destruction. Thus, the Universal Declaration of Human Rights provides that "everyone is entitled to a social and international order in which the rights and freedoms set forth in [the] Declaration can be fully realized."⁷³ Nuclear weapons threaten that order, and even as ardent a positivist as H.L.A. Hart has recognized that at the core of law is the assumption that "the proper end of human activity is survival."⁷⁴

D. The Right to Peace

The "right to peace" is another legal expression of humankind's collective natural right to survive. In 1979, Karel Vasak, the chief legal officer of UNESCO, argued that civil and political rights, and social, economic and cultural rights, are being joined and enhanced by a "third generation of human rights" which includes the "right to peace."⁷⁵ Though such "group rights" or "solidarity rights," or "global rights" as Saul Mendlovitz has called them,⁷⁶ remain controversial within the international human rights community,⁷⁷ they have, in fact,

73. Universal Declaration of Human Rights, *supra* note 61, at art. 28.

74. H.L.A. HART, *THE CONCEPT OF LAW* 187 (1961).

75. See Vasak, *Inaugural Address: Pour Les Droits de l'Homme de la Troisième Generation: Les Droits de Solidarité*, in *International Institute of Human Rights, Summary of Lectures—Tenth Study Session* (July 1979).

76. In Mendlovitz' view, the struggle for individual civil and political rights now typical of western liberal (capitalist) democracies marked the 19th century; the struggle for group social and economic rights typical of eastern communist societies marked the 20th century; and the struggle for global, or planetary rights such as those we are now beginning to see develop (e.g., the right to a clean environment and the right to peace) will mark the 21st century. See Mendlovitz, *Remarks*, 9 BROOKLYN J. INT'L L. — (forthcoming 1983).

77. E.g., A. H. Robertson, one-time Acting Secretary General of the International Institute of Human Rights and noted specialist in international human rights law, consistently criticized "third generation rights" during sessions of the Institute's Human Rights Teaching Center because, in his view, they are not susceptible to enforcement by law. Additionally, he wondered against whom such rights might be enforceable.

For a thoughtful critique of the right to peace as a group or solidarity right, see Bilder, *The Right to Peace as a Human Right*, Remarks made at the International Symposium on the Morality and Legality of Nuclear Weapons, in New York City (June 4-5, 1982). (Available in author's file at Nova University Center for the Study of

generated substantial debate and academic inquiry in Europe.⁷⁸ Only very recently have they been taken up as the subject of study within the United States.⁷⁹ If such rights exist, or are in the process of being created, whether reached inductively as the aggregate of all individual civil, political, social, economic and cultural rights recognized by international law or deductively from the evolving world order of humanity entering the twenty-first century, then the right to peace must be added to the norms limiting nuclear options. Though "peace" may mean more than mere absence of war, it certainly means at least absence of war and assurance of survival. The "right to peace" may thus confirm the integration of H.L.A. Hart's observation regarding the axiomatic relationship of law and survival⁸⁰ into the global legal system, meeting effectively, on a conceptual level at least, the threat of planetary eradication by nuclear holocaust.

Conclusion

As has been aptly put by Professor Saul Mendlovitz, "nuclear weapons are disgusting."⁸¹ They are an abomination that must be outlawed by any civilized legal system worthy of the name.

International law already explicitly prohibits many, perhaps most uses of nuclear weapons. The structures and norms of international law and evolving conceptualizations of limits on state sovereignty strongly suggest the illegality of the remaining uses. At the very least these remaining uses should be seen as no more than exceptions which ought not be permitted to devour the emerging proscriptive rule. The international illegality of so many uses of nuclear weapons shifts the burden of persuasion to the proponents of nuclear weaponry. It is they who are on

Law).

78. See, e.g., Morehouse, *The Right to Peace or the Right to Live*, 6 HOLDSWORTH L. REV. 120 (1981); and the following articles contained in 1980 BULLETIN OF PEACE PROPOSALS NO. 4, SPECIAL ISSUE: THE RIGHT TO PEACE AND DEVELOPMENT: Alston, *Peace as a Human Right*; Marks, *The Peace—Human Rights—Development Dialectic*; Lopatka, *The Right to Live in Peace as a Human Right*.

79. See, e.g., Bilder, *supra* note 77; Nanda, *Nuclear Weapons and the Right to Peace Under International Law*, 9 BROOKLYN J. INT'L L.—(forthcoming 1983).

80. See *supra* note 73 and accompanying text.

81. Mendlovitz, *supra* note 76.

the defensive now, legally as well as morally, they carry the onus of seeking legal sanction for the remaining nuclear weapons uses.

A comprehensive custom outlawing nuclear weapons *per se* is in the process of being created. It is, hopefully, only a matter of time before municipal as well as international legal systems specifically prohibit all use of nuclear weapons. In the alternative, our present civilization will vaporize in the blinding flash of nuclear explosions forever destroying humankind, its legacy of achievements and its dreams for a future of well-being and peace.

Professor Arthur S. Miller, in his seminal work, has given to American lawyers the hope of promise and the burden of challenge. He calls upon us to help our domestic legal system rise to the task of meeting head-on the nuclear nightmare of our time, a bad dream come true beyond the imagination of even the most pessimistic of eighteenth century apocalypsts. By probing our nearly two hundred year old constitution for checks and balances and values that could "secure the Blessings of Liberty to ourselves and our Posterity"⁸² he sets a standard of achievement we must all strive to meet.

In response to Professor Miller's challenge, international lawyers must first turn a conservative, slow-moving discipline to face the nuclear challenge just as Miller has so artfully turned the U.S. Constitution. Second, they must help educate American domestic lawyers to the fact that international law is part of the law of the land. Success in the first will make the second all the more important: the United States remains the most powerful nuclear arsenal on earth. Fortunately, law is on the side of those who wish to hold the President to an international rule of law. The Constitution, in this matter, is clear. If, as suggested above, a norm of international law prohibits all, or at least most uses of nuclear weaponry, to answer Professor Miller's question, that norm is "part of the corpus of 'laws' that the President must faithfully execute."⁸³

82. U.S. CONST. preamble.

83. Miller, *supra* note 5 and accompanying text.

Admirable Ends—Ineffective Means

Iredell Jenkins*

I agree, of course, with the thrust of Professor Miller's paper and with the conclusion at which he arrives. There can be no question that nuclear weapons pose a threat not only to civilization and to all human beings, but even to the life process itself. It follows, then, that the proliferation of such weapons contravenes the fundamental principles of morality, the accepted rules of international law, and any sane idea of national interest and policy. Furthermore, I think that Professor Miller's five arguments make out a cogent case for his conclusion that "the manufacture, deployment, and possible — even probable — use of nuclear weapons contravene the Constitution".¹ Each of these arguments is closely reasoned and well supported; together they present a persuasive defense of his claim, which might on its face appear unreasonable to the point of absurdity.

One may be tempted to object that the time-honored doctrine of *raison d'état* makes these arguments and this conclusion meaningless: for this doctrine holds that any state is justified in taking—and is certainly going to take—whatever steps it deems necessary for its own protection. However, this argument fails for the simple reason that when several states possess significant numbers of nuclear weapons, then their use by any one state would quite surely lead to retaliation and hence to its own destruction. And this goes directly against the purpose of *raison d'état*, which is to guarantee the existence of the society of which the state is the agent.

Consequently, and as a point of departure for this response, I am prepared to stipulate Professor Miller's conclusion that "those who wield both formal authority and effective control in the American constitutional order have a duty to take action designed to eliminate the nuclear threat throughout the world" and that "the duty . . . is of con-

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1. Miller, *Nuclear Weapons and the Constitution*, 7 NOVA L.J. 21, 23 (1982).

stitutional dimension.”² However, despite all of this, I fear that the conclusion itself will be inconsequential because it has no precise and positive content. Stated more explicitly, the nature of this “constitutional duty” is both unspecified and devoid of sanctions; it does not impose any clearly defined obligations, either positive or negative, upon those to whom it is addressed; and it does not suggest any ways in which these “obligations” could be enforced and derelictions therefrom punished. This judgment must be qualified by pointing out, as Professor Miller stresses, that this essay is a “preliminary inquiry,” not a “full-dress exposition.”³ Its purpose is to raise an issue rather than settle it, and so to initiate a cooperative discussion of legal (constitutional) procedures as a possible means to control the deployment and use of nuclear weapons. A final judgment, therefore, must be held in abeyance; but as the case now stands, I fear that however admirable the end sought, the means proposed will prove ineffective.

The argument that supports this judgment stands on three legs. Each of these is itself based upon a contention or concession that is central to Professor Miller’s case and essential to its understanding and evaluation. My purpose in developing this argument is to indicate the difficulties I perceive in his position and thus to contribute as best I can to the discussion he seeks. He has made an admirably provocative start, and the undertaking is eminently worthwhile.

I take my first step with Professor Miller’s statement that his paper “is emphatically not a plea for unilateral disarmament. We live in a Hobbesian world, a condition that is not at all likely to change.”⁴ Since the nations of the world have rejected the irenic precept of live and let live, adopting instead a policy of dog eat dog, the international climate is poisoned by mistrust and fear. Given this atmosphere, any suggestion of unilateral disarmament would be tantamount to putting one’s self at the mercy of one’s enemies. If nuclear disarmament is to be safe and acceptable, it must be mutual, with every nation disposing of its entire arsenal: “every weapon of mass destruction in the world”⁵ must be eliminated. This is the outcome that the Constitution is held to

2. *Id.* at 24.

3. *Id.* at 23.

4. *Id.* at 24.

5. *Id.*

require. This is made quite explicit in the passage quoted earlier, where it is stated that the “constitutional duty” imposed on the government is “to take action designed to eliminate the nuclear threat *throughout the world*”⁶ (Emphasis added). Since nuclear weapons anywhere clearly pose a threat to our lives, liberties, and properties, we, as American citizens, have a right to be free of them, and the government has the duty to see that we are.

Standing by itself, this contention appears self-evident. If the government owes us protection against arbitrary search and seizure, double jeopardy, self-incrimination, and cruel and unusual punishment — not to mention such benefits as clean air, pure water, adequate diet, and proper health care — then it would certainly seem to owe us protection against instant immolation. Therefore one is inclined to take this first step without hesitation.

This brings me to my second step. Here I take as my text Professor Miller’s statement on page 23: “At the outset, I readily concede the jurisprudential problem of whether legal norms (rights) can exist absent a means of enforcement”. It is, of course, traditional doctrine that a right accorded to some is barren without a corresponding duty imposed on others. It is further recognized that both the right and the duty are bootless unless there are sanctions to enforce the latter and make good the former. It is difficult to see just what legal (constitutional) means are available to secure to the people this right to the worldwide elimination of nuclear weapons. If the Supreme Court were to issue orders to this effect, how is it to enforce them against this government, let alone the governments of other sovereign states?

To this objection, Professor Miller offers two rebuttals, both sound in principle. He first points out that there are both constitutional and legislative duties that cannot be judicially enforced or for the neglect of which no penalty is even provided.⁷ Secondly, he reminds us that the law is instrumental and living, and that the courts are continually recognizing new rights and creating new duties as the occasion seems (to them) to require. These points are well taken, but I do not think they are applicable in the present context. When the courts accord rights to privacy, abortion, racial integration, and so forth, they impose duties

6. *Id.* at 24 (emphasis added).

7. *Id.* at 23.

that are at least within the claimed and granted (albeit reluctantly) jurisdiction of the federal government, and to enforce these rights they can create sanctions, however ineffective and difficult to enforce they may be. But when the courts recognize the right of American citizens to the elimination of *all* nuclear weapons *everywhere*, they impose duties that are altogether beyond both the legal jurisdiction and the practical reach of the federal government. For the courts now tell the government of this country to achieve certain outcomes in other countries whose governments recognize no authority superior to themselves and which command power commensurate with that of this country. Without a common sovereign which holds both ultimate authority and a monopoly of power, rights and duties become mere words. The gist of the matter is this: the writ of the federal courts simply does not run in other sovereign states.

I now take my third step, which raises the most concrete and practical issues. This is again based on the passage previously cited from page 23 and also on another passage of similar import with which professor Miller summarizes his argument. The latter runs as follows:

“My suggestion is that Supreme Court Justices should grasp the nettle and point out to the Executive and the Congress that officials in those branches are charged with a constitutional duty to take action to eliminate threats to the lives, liberties, and properties of the citizenry. Those threats emanate from nuclear weaponry.”⁸

In both of these passages, it is the phrase “take action” that I want to emphasize: the government is to be told that it has a “constitutional duty” to “take action” to “eliminate the nuclear threat throughout the world.” Even if we grant that the Supreme Court should in principle and does in fact issue orders to this effect, the critical question remains: *What action?*

Precisely what actions are the Executive and the Congress to be ordered to take? A duty which is hopelessly vague or with which compliance is impossible to determine is as empty as one that is unenforceable. And simply to order “action” would be the epitome of vagueness: the government could claim compliance on the basis of virtually any effort whatever; or it could refuse to disclose the “actions” it had taken,

8. *Id.* at 35.

justifying its refusal by invoking the sacred cow of the “national security”. One could answer this objection by arguing that the Supreme Court decision mandating this new duty would be similar to that in the 1954 school desegregation opinion: the Court would simply order the President and the Congress to take steps to effect universal nuclear disarmament “with all deliberate speed”.⁹ The specifics of this mandate would then be left to be worked out in a series of suits and rulings.

But I do not believe that this argument would stand up. Mutual nuclear disarmament by numerous sovereign states is obviously a matter of foreign policy; and the conduct of foreign policy is, by the Constitution itself, conferred on the President with the advice and consent of the Senate. What actions this country could and should take in this area are matters of high policy, involving diplomatic, political, military, and economic dimensions: intelligent decisions require wide experience, vast amounts of detailed information, and the cooperation of experts from numerous esoteric fields. It seems doubtful if even those omniscient legal deities, the Justices of the United States Supreme Court, could muster the data and acquire the familiarity that would be needed to issue reasonable and effective orders regarding nuclear disarmament. The Court could, of course, solicit *amicus* briefs from innumerable experts; and they could subpoena witnesses and documents from the several executive departments. But much of this information is strictly classified, hardly suitable to be aired in legal briefs, open hearings, and the Supreme Court reports; and the advice that the Justices would receive would certainly be so diverse and contradictory that they would, in the last analysis, have to rely upon their own judgment, untrained as that is in this field. Even if all of these hurdles could be surmounted, it is difficult to see what “action” the Court could order. In negotiating the reduction of nuclear weapons with other sovereign states, there are only two procedures this government can employ: it can threaten and it can deal. And that is precisely what every President for at least the past thirty years has been doing.

There are two further issues that should be considered briefly. The first concerns Professor Miller’s alternative proposal that the “first-strike use of nuclear weapons should . . . be dropped as a policy op-

9. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

tion.”¹⁰ This is a more moderate suggestion. And it is an “action” that the Supreme Court could easily order, since it is simple and specific—enforcing the order, however, would be another matter. But quite apart from the wisdom and practicality of such a step, I fear that it would prove ineffective as an instrument of peace and ineffective as an inducement to other states to take similar action, for the government that adopted such a policy of renunciation could not bind future governments. The state is an enduring entity; but circumstances change, and so do governments and their perceptions of these circumstances. Consequently, the announcement of such a policy would have little meaning or impact. It would offer no lasting guarantee to the society that adopted it and even less to other states and their governments.

The second of these issues concerns the idea—suggested but not developed in Professor Miller’s paper—that a Supreme Court decision condemning nuclear weapons on constitutional grounds and mandating action to effect their worldwide elimination would have great moral force and persuasive power. Even if the Court could not enforce such an order or specify its meaning, its mere announcement might serve to make the public more conscious of the terrible dangers and the ultimate evils inherent in the proliferation of nuclear arms. This is a possibility that should not be dismissed lightly. There is not the slightest doubt that past Supreme Court decisions have had just such an impact on this society, and even on the international order: one thinks particularly of decisions on racial integration, the equality of women, access to the political process, and human rights in general.

However, I do have serious doubts, based on two grounds, whether a Supreme Court ruling on nuclear weapons would have a similar impact. One of these grounds concerns the context of such a ruling. Intense suspicion of Russian policy and intentions, and hence an obsessive fear of Russia gaining nuclear superiority, are endemic in this country. Given this atmosphere, any such Court ruling would almost certainly be interpreted as mandating unilateral disarmament; so it would be greeted with outrage and dismissed with contempt.

The other ground of my doubts concerns the present public standing of the Supreme Court, for I do not think that the Court now enjoys anything like the respect and moral authority that it once did. The

10. Miller, *supra* note 1, at 30.

mystique of the Court—the sense that it was somehow above the political process, untainted by ordinary human passions, and immune to outside pressures—has been largely stripped from it. Once the Supreme Court was thought to be concerned only with the Eternal Law writ large in the Constitution, and the Justices were seen as moved only by constitutional considerations. But now we are only too aware that the Court is concerned with the same social issues that occupy us; and we have learned that the justices are as much influenced by their biases and personal backgrounds as the rest of us.

This shift in view is due partly to the greatly enhanced publicity accorded the Court, and to an increasing public cynicism regarding all institutions. It is also due very largely to the extreme activism of the Supreme Court in recent decades. The Court has intervened in so many moral and social questions that touch people deeply, and it has issued decisions that have aroused such resentment, that it is now widely regarded not as a pure servant of the law, but rather as the tool of special interests, especially those of an ultra-“liberal” persuasion. The Supreme Court and the federal judiciary have been extremely courageous in intervening to correct social ills that had been neglected and ignored by all of the governmental authorities that bore responsibility for them. But this fact does not lessen the resentment and mistrust that have been directed against the Supreme Court.

Be all this as it may, I doubt if a Supreme Court ruling on nuclear disarmament would have any significant moral force or persuasive power. When survival is thought to be in question, even the strongest moral voice falls on deaf ears, and even the most perfect argument fails to assuage fear.

Professor Miller made it very clear that he wanted his respondents to offer criticisms and suggestions that could fuel a further dialogue. I have certainly offered criticisms, though suggestions, alas, have been sadly lacking. But I would not wish to close on this negative note, for I think Professor Miller’s proposal could be extremely important: whether it will be, only the ensuing dialogue can tell.

If we are to consider Professor Miller’s paper at all sanely and sympathetically, we must take seriously the quotations from A. N. Whitehead with which he introduces his proposal; these set the necessary tone for his suggestion. It is precisely our fundamental and unquestioned assumptions that most need to be brought into the open and re-examined. And when some hardy soul does this, and proposes fresh

ideas, these are apt to appear patently absurd. And so it is with this idea that nuclear weapons pose a constitutional issue to which lawyers and the courts should address themselves. It has long been assumed that the conduct of foreign policy and the care and nurture of the national security were to be left to the President and his military and diplomatic advisors. The Congress was held to have very little business meddling in these matters, and the federal courts to have none at all: these latter need only recognize that treaties duly ratified were part of the law of the land.

That is no longer a safe assumption. Professor Miller's view that judges are "timorous creatures" who "look upon requests to go beyond the familiar and the expected as frightful occasions"¹¹ may be sound as a general proposition. But it seems clearly not applicable to the federal judiciary as a whole, nor especially to the justices of the Supreme Court. During the past thirty years or so, these men have not hesitated to assert that they have the highest wisdom and hold the ultimate authority in such matters as school integration, racial balance, abortion, the prevention and punishment of capital crimes, reapportionment, and the treatment of the mentally ill and prison inmates.¹² All of these issues were regarded as altogether beyond either the jurisdiction or the competence of judges and courts: they were the proper and ordained domains of other experts and authorities. But in all of these contexts, the federal courts have intervened—"meddled"—to correct persistent and intolerable ills. I hold no strong brief for federal judges as arbiters of moral, social, economic, and other such problems: their reach often exceeds their grasp, and their discretion fails to match their valor. But these judges have, time after time, acted to repair gross injustices and initiate significant reforms.

So despite the reservations voiced above, I am sympathetic to Professor Miller's proposal and I am prepared to be optimistic that it might bear fine fruit. I would anticipate two great obstacles to this happy outcome. First, I do not see what measures—what "action"—the

11. *Id.* at 36.

12. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Roe v. Wade*, 410 U.S. 113 (1973); *Woodson v. North Carolina*, 428 U.S. 280 (1960); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wyatt v. Stickney*, 344 F. Supp. 373 (1972), *aff'd in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (1974); *Rhodes v. Chapman*, 452 U.S. 337 (1981).

Supreme Court could mandate, aside from those that every administration has employed: to deal and to threaten. (Though I certainly acknowledge that several of these administrations, and especially the present one, could be a great deal more restrained, constructive, and cooperative in their dealings with the Soviets instead of treating them as avowed enemies.) Second, and more serious, is the fact that some of the parties—sovereign states—whose agreement is essential to nuclear disarmament, are altogether beyond not only the grasp, but even the reach, of the Supreme Court. Judges have encountered more than enough recalcitrance and open defiance from state legislatures and governors. It would be interesting to be hidden behind an arras, like some hero of a gothic romance, when some diplomat hands a Supreme Court writ to Yuri Andropov (Brezhnev's successor), Indira Ghandi, or Menachem Begin.

But any such event as this lies in a distant time and a different clime. And if it ever occurs, the writ will come from a court serving as the agent of a single world sovereign. For the foreseeable future, the Supreme Court will have to contend itself with enhancing public consciousness of the enormity of the threat and with putting incessant pressure on the other branches of government. On first acquaintance, Professor Miller's proposal does such violence to our political and legal presuppositions that it has the aura of the judicial equivalent of science fiction. But we all know how often the science fiction of one year is the technological fact of the next. And when I recall the changes that the federal courts have wrought in recent decades, I think that this may well be an idea whose time has come.

Lawyers Can, But Law May Be Unable to Contribute to Nuclear Weapons Debate

L. Harold Levinson*

Professor Miller concludes that "law and lawyers have something useful to contribute to the growing debate about nuclear war." I agree that lawyers can make a useful contribution. Whether the law can make a contribution is quite another matter, on which I have serious doubts.

In order to evaluate the contribution that the law can make, let us assume that Miller has convincingly demonstrated that the United States Constitution prohibits the manufacture, deployment and use of nuclear weapons. Let us also assume that, in order to resolve any lingering doubts, the people of the United States have added a new amendment to the Constitution, worded as follows:

1. It is the policy of the United States that the public or private production, ownership, deployment, use or threatened use of nuclear weapons, whether inside or outside the United States, violates basic human rights in the United States and throughout the world.
2. The Congress, the President and all other officers of the United States shall take all actions that are feasible to implement this amendment.

What could be the effect of this constitutional message upon the conduct of national and international affairs?

Clearly this constitutional amendment would not oblige the United States to disarm unilaterally while other countries continue to stockpile and deploy nuclear weapons. Even if the amendment, when read in isolation, could be interpreted as a mandate for unilateral disarmament, it would have to be read in context of the government's basic responsibility to preserve and defend the nation. It is inconceivable that the United States Supreme Court would order the President and Congress

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to engage in unilateral disarmament. Even if the Court rendered such an order, it is inconceivable that the President or Congress would obey it.

What would happen if the United States entered into multilateral agreements with other countries, whereby all undertook to eliminate nuclear weapons — would the Supreme Court then order the President and Congress to carry out the obligation of the United States to disarm, and would the President or Congress obey any such court order? Again, the answer must be negative. The Supreme Court is in no position to monitor compliance, by other countries, with a multilateral agreement to disarm, nor can the Court react effectively to any violation that may occur. The most that the Court could accomplish would be to settle disputes as to whether an action taken or proposed by the President or Congress was within the jurisdiction of that branch of government. But even here, the highly sensitive nature of the subject matter might discourage the Court from stepping in.

It seems, then, that the hypothetical constitutional amendment discussed above would not establish any enforceable law. It could, however, be seriously misunderstood by foreign governments, who might interpret it as a signal that the United States was committed to disarmament whether or not other countries reciprocated. The security of the United States would then be seriously endangered.

The hypothetical constitutional amendment would, of course, be a powerful statement of public opinion, and the proceedings leading to its ratification would provide a massive public forum for the debate on nuclear weapons. But public opinion can be expressed very effectively in many other ways, including the election of public officials, the conduct of polls, or the use of "1-900" telephone surveys at a cost of 50 cents per "vote." If the American people insist on an end to nuclear weapons, they are quite capable of making their wishes known without the need for an amendment to the Constitution or for a reinterpretation of the existing constitutional language.

The preceding comments reflect my serious doubt that the adoption of a constitutional amendment, or the reinterpretation of the existing constitution, could legally bind the United States government to engage in nuclear disarmament. The constitutional arguments could be ingredients of a public forum, but they would not be essential ingredients, and the debate could proceed on questions of national and international policy as effectively without as with the inclusion of the consti-

tutional arguments. Indeed, the elimination of constitutional arguments might speed up the debate, by preventing lengthy discussion or litigation about the jurisdiction of the courts, the standing of any potential plaintiffs, or other technicalities.

This means that lawyers would not be able to contribute, to the public debate, any specialized knowledge of legal rules or technicalities pertaining to the subject matter. This does not mean, however, that lawyers should drop out of the public debate. To the contrary, as public citizens, lawyers have a special responsibility to address matters of public concern, even when the matters cannot be resolved by resort to legal rules or technicalities. Lawyers are equipped to understand the framework of institutions, to engage in rational and persuasive discourse, to sift and compare ideas, to offer and demand the presentation of facts, to marshal the arguments from various perspectives, and to seek accommodation of conflicting tendencies. Holding these skills in trust for society, lawyers have the opportunity and obligation to use them, not only when a legal rule or technicality is at issue, but more broadly, whenever a matter of general social concern is ripe for debate.

In the latter situation, the lawyer does not authoritatively lay down the law. Rather, as an articulate citizen, the lawyer participates equally with other citizens in wrestling with a common problem.

The threat of nuclear weapons is horrendous. The burden on public officials is staggering. The need for public debate is urgent. No higher challenge or opportunity has faced lawyers as citizens.

Letter from the Government

William H. Taft, IV*

July 15, 1982

Articles Editor
Nova Law Review
3100 S.W. 9th Avenue
Fort Lauderdale, Florida 33315

You have written to both Secretary Weinberger and me inviting us to comment in your law review on the issues raised in Professor Arthur Miller's article "Nuclear Weapons and Constitutional Law." This letter is in response to both invitations. We appreciate very much the opportunity thus provided.

Professor Miller's article suggests that officers of the federal government are under a constitutional duty to take action to eliminate the threat to American lives, liberty, and property posed by nuclear weapons. It is not necessary to agree with Professor Miller's constitutional analysis, much of which he himself characterizes as tentative and even far-fetched, to recognize the responsibility of government officials in this regard. Quite apart from the implicit powers and duties derived from the doctrine of *raison d'état*, which Professor Miller evidently views with some ambivalence,**

* General Counsel of the Department of Defense.

** Professor Miller's ambivalence arises, I believe, from a misunderstanding of the relationship between national security in the context of international affairs and personal security. Professor Miller perceives a tension between the interests of the state in maintaining its authority and individual rights. While this tension undoubtedly exists in a domestic context, with regard to threats to individual rights by foreign countries,

there is an explicit provision in the Constitution that bears on this matter. Section 4 of Article IV provides that

“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion. . . .”

2

In addition, the Constitution requires both the President and Members of Congress to swear that they will support the Constitution.

These provisions together sufficiently establish the existence of the constitutional duty to reduce and, if possible, eliminate the threat that nuclear weapons pose to the individual freedom and rights of Americans set out in the Constitution. The Reagan Administration has, of course, recognized its responsibilities in this regard. Its policy has been and continues to be to deter the use of nuclear weapons first by assuring that any adversary knows that we have sufficient strength to inflict unacceptable damage in retaliation against any attack that may be made on us and, secondly, by entering into negotiations with the Soviet Union to reduce substantially the arsenals of nuclear weapons held by both that country and the United States.

Sincerely,

William H. Taft, IV

national security and personal security are interdependent: the survival of the state is what in this context preserves the individual rights secured by the Constitution. Threats from nuclear weapons arise, needless to say, only in an international context.

Nuclear Weapons: Unconstitutional or Just Unjust?

Gary L. McDowell*

Before one can reasonably assess Professor Miller's argument in "Nuclear Weapons and Constitutional Law," a fundamental distinction needs to be drawn. That distinction is between the *Constitution* and *constitutional law*. For Professor Miller, there is no Constitution beyond constitutional law; the Constitution is only what the judges say it is — no more, no less. And what the judges say it is depends only upon what Oliver Wendell Holmes in *The Common Law* called the "felt necessities of the times."¹ In Professor Miller's estimation the Constitution has no inherent political theory; its meaning depends only upon time and circumstance — and the judge's intuition.

Professor Miller's argument concerning the constitutionality of nuclear weapons can only be made once the Constitution is separated from constitutional law and discarded — or at least ignored. What must guide our constitutional thinking, Professor Miller insists, are not "old practices and old modes of thinking about constitutional propriety" but "new doctrine."² That new doctrine, apparently, is to be "discovered" in the higher law that Professor Miller is sure hovers above the Constitution itself. Professor Miller's quest is for the judicial formulation of a doctrine — the creation of a new right, actually — that postulates that "nuclear weapons are a clear and present danger both to survival and especially to achievement of human dignity."³ Thus, nuclear weapons, by the enormity of their potential destructiveness — the annihilation of human existence — violates the essence of natural justice. But to say that something violates natural justice is not the same thing as saying it violates the Constitution. As James Wilson saw fit to remind his fellow-delegates to the Federal Convention of 1787, "laws may be unjust, may be unwise, may be dangerous, may be destructive;

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1. O. HOLMES, *THE COMMON LAW* 1 (1881).

2. Miller, *Nuclear Weapons and the Constitution*, 7 *NOVA L. J.* 21, 31 (1982).

3. *Id.* at 26.

and yet not be . . . unconstitutional.”⁴ The same logic holds for nuclear weapons the procurement and accumulation of which is a matter of public law.

Rather than examine each strand of Professor Miller’s legal reasoning, I prefer to consider the theoretical premises from which his arguments spring. For his theoretical premise—the idea of a living Constitution — is ultimately at odds with the logic of the Constitution itself.

The aim of those who framed the Constitution was to produce a document that they hoped would “last for ages.”⁵ Their belief was that safe republican government depended upon a constitution that would be venerated by the people as “fundamental” and “paramount.”⁶ To achieve such popular veneration — and to enjoy the necessary political stability that would flow therefrom — the framers recognized, first, that the constitution would have to be a *written* constitution and, second, that there would have to be a popular presumption of textual permanence of the document itself. That is, as James Madison understood it, its meaning was not to be “sought in the changeable meaning of the words composing it” but rather in “the sense in which the Constitution was accepted and ratified by the nation.”⁷ Original intention and original meaning were held to be the primary means by which the written constitution could be kept a *limited* constitution. In this belief men as politically opposed as Thomas Jefferson and John Marshall could stand united. A written constitution, Jefferson said, was our “peculiar security”;⁸ to Marshall, it was the “greatest of all improvements on political institutions.”⁹

Professor Miller’s argument, then, rests on a cracked foundation; for he makes a common error when he seizes John Marshall’s *dictum*

4. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 73 (M. Farrand 2d ed. 1937).

5. *Id.* at v. 1, 422.

6. THE FEDERALIST No. 53, at 361 (J. Madison) (J. Cooke ed. 1911); No. 78, at 525 (A. Hamilton) (J. Cooke ed. 1911).

7. TAKING THE CONSTITUTION SERIOUSLY 1 (G. McDowell ed. 1981) (quoting James Madison to Henry Lee).

8. Thomas Jefferson to Wilson C. Nicholas (Sept. 7, 1803), *quoted in* THE LIFE AND WRITINGS OF THOMAS JEFFERSON 573 (A. Koch & W. Peden eds. 1944).

9. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

in *McCulloch v. Maryland*¹⁰ (a statement Professor Miller holds to be “the most important ever uttered on the theory of constitutional interpretation”)¹¹ as his authority for a living constitution. Marshall’s well-known remark that the Constitution was “intended to endure for ages to come and, consequently, to be adapted to the various *crises* of human affairs”¹² is taken by Professor Miller to mean that the Constitution “may validly be considered to be a tacit delegation of power by the framers to enable succeeding generations of Americans to write their own fundamental law — to meet, that is, the exigencies of *their* — not the framers’ times.”¹³ The crucial element of Professor Miller’s argument derives from the mistaken notion that Marshall was referring to constitutional interpretation by the judiciary. He was not. The power of adaptation Marshall was pointing to was a *legislative* not a *judicial* power. The flexibility to meet the unforeseen exigencies of the future lay in the legislative power to draft whatever laws Congress should deem necessary and proper. Marshall was speaking to the necessary flexibility of *statutory* law, not *fundamental* law. Doubters need only look as far as his opinion in *Marbury v. Madison*:

That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.¹⁴

Professor Miller assumes that the changes brought about in the instruments of war “by the scientific-technological revolution”¹⁵ have resulted in a substantive transformation in the nature of war as it is understood under the Constitution. This does not necessarily follow.

10. 17 U.S. (4 Wheat.) 316 (1819).

11. Miller, *supra* note 2, at 28.

12. *McCulloch*, 17 U.S. (4 Wheat.) at 415 (emphasis original).

13. Miller, *supra* note 2, at 28.

14. *Marbury*, 5 U.S. (1 Cranch) at 176.

15. Miller, *supra* note 2, at 28.

Constitutionally, war is war. *Constitutionally*, Congress is obligated to do what it considers to be necessary and proper to give contemporary expression to its constitutional power to prepare for and wage war. (The constitutional power to declare war implies a constitutional power to prepare for war, following Marshall's logic in *McCulloch*.) If that means, in the deliberate judgment of Congress, procuring and stockpiling nuclear armaments, then such an activity is *constitutionally* permissible. It may be imprudent and dangerous but it is not unconstitutional. Further, *constitutionally*, the President as Commander-in-Chief, is empowered to direct whatever forces of war Congress places at his disposal.

Professor Miller's argument grows from a belief that the judiciary, in Owen Fiss's words, possesses "a special kind of substantive rationality"¹⁶ that enables it to declare constitutional values and to make the policy conform. Judges are not so much arbiters of concrete legal and constitutional disputes as they are seers and soothsayers pondering principles of abstract justice. Professor Miller apparently subscribes to the dominant jurisprudential view that constitutional values — that is, "broad and idealistic concepts of dignity, civilized standards, humanity, and decency"¹⁷ — are the stuff of constitutional law. The Constitution itself cannot be allowed to get in the way of doing good.

The constitutional and political dilemmas posed by this view are that the declaration of a constitutional or public value is a highly intuitive and personal judicial matter. A constitutional value depends more upon a creative judicial imagination than upon constitutional text or intention. This is hardly the foundation of limited constitutional government.

Conclusion

Professor Miller, like a growing number of Americans, is rightly concerned about the proliferation of nuclear weapons and, to borrow Jonathan Schell's phrase, the fate of the earth.¹⁸ But his solution misses the mark. Nuclear arms and the possibility of nuclear war are too im-

16. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 18 (1979).

17. *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968).

18. J. SCHELL, *THE FATE OF THE EARTH* (1982).

portant to delegate to the judiciary. Like all the important and controversial public debates that generally characterize a popular form of government, they deserve to be addressed by political deliberation — not by judicial decree.

The Constitution and Nuclear Defense

Arval A. Morris*

It is becoming common knowledge¹ that the combined nuclear arsenals of the United States and the Soviet Union contain more than 50,000 warheads, having a destructive power more than one million times greater than the atomic bomb that destroyed Hiroshima. In terms of blast equivalences, these weapons represent four tons of TNT for every living person on earth. One United States Polaris submarine can destroy 128 Soviet sites, and carries more firepower than all the weapons used in World War II. The new Trident submarines are still more powerful. These new weapon systems and the underlying strategic planning leave old notions of deterrence behind. These weapons are building toward a capacity to fight as well as to deter nuclear war, and some civilian and military analysts are even asserting that a nuclear war can be fought and "won". The United States and NATO have long expressed their policy to use nuclear weapons first — especially "tactical" nuclear weapons — if necessary, to stop a Soviet invasion of Europe.²

The United States is improving and developing more and more precise missiles and anti-submarine systems, thereby affording the

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1. The next several pages draw heavily on the literature of the Lawyers Alliance for Nuclear Arms Control, Inc., 11 Beacon Street, Suite 719, Boston, Mass., 02108, but any one of dozens of contemporary sources would have done as well. This group seeks to end lawyer apathy in the area. This is especially critical since lawyers learn and practice the skills of conflict resolution which are the very skills that must be applied to the nuclear arms race if we are to avoid nuclear war. Lawyers separate fact from fancy, distinguish the relevant from the irrelevant, and negotiate lasting agreements building upon common or compatible interests in efforts to obtain peaceful solutions to problems of conflict. Nowhere are these skills more in need today than in nuclear arms limitation, reduction and elimination.

2. See Mossberg, Wall St. J., Oct. 15, 1982, at 4, col. 1, Haig and Weinberger here confirmed this policy under the heading *Nato Chief Warns of New Soviet Strategy to Deny the West the Use of Its Nuclear Punch*.

United States a theoretical first-strike attack capability. It will be a "counterforce" capability having the power to destroy all or most of the Soviet Union's nuclear arsenal. This "counterforce" capability is claimed to be defensive only, but since the weapons can deliver a first-strike, it can be seen as offensive as well. Military analysts expect the Soviet Union to have this same first-strike capability sometime before the end of this decade.³

The possibility of intentional full-scale nuclear war hangs by a hair trigger. Such a war would last only a matter of hours. If launched from the Atlantic Ocean, missiles from the new Trident submarine could hit Moscow in just ten minutes. Moreover, Pershing II missiles are currently scheduled for deployment in West Germany. They could hit targets in the Soviet Union in a mere four minutes. The Soviets have similar capabilities. Thus, it is obvious that the White House or the Kremlin will have only a few minutes in which to evaluate a report of an incoming missile attack and decide whether to launch a nuclear strike in response. It is quite possible that technological advances will force this decision to be delegated to computers and their "specialists". Indeed, if a non-first-strike nuclear power is confronted by another nuclear power possessing a first-strike counterforce capability, it can be considered "rational for the non-first strike power to adopt a "launch on attack" or "launch on report" policy. It is widely feared the Soviets may adopt such a policy if the United States maintains its present philosophy. The destiny of mankind would then have been turned over to machines.

The probability of accidental nuclear war is genuine and increasing. The warning system of the United States Air Command has reported hundreds of false alarms about incoming missiles, and has otherwise malfunctioned. No American actually knows the reliability of the Soviet Union's command and control systems. Yet, ironically, for all the billions they have spent on defense, the American people must rely every day on the Soviet systems to prevent our destruction. So far, the Soviet systems have been sufficiently reliable to protect Americans from a wave of nuclear weapons launched because of an accident or malfunction. But how long will security last? Currently, six countries

3. See *supra* note 1.

admit they have atomic arms.⁴ By the end of this century, an additional two dozen countries are expected to have nuclear weapons, thereby increasing dramatically the probability of accidental, or intentional, nuclear war.

Indeed, the existence of a "counterforce" first-strike nuclear capability that could destroy most of an opponent's nuclear weapons while they remain on the ground, makes nuclear war appear "rational" under certain circumstances. Suppose for example that Iran, with Soviet backing, masses its military forces to invade Saudi Arabia and the Arab Emirates, thereby eliminating most of Europe's and Japan's oil supply, as well as much of our own. Irreparably crippled, the United States, invoking the Carter Doctrine,⁵ declares its vital security interest threatened and prepares to intervene. It can do so effectively only by using American troops. The Soviet Union threatens the United States, saying it will not tolerate U.S. troops fighting in Iran or Saudi Arabia, which are just below its southern border. It then masses its troops on the Iranian border. Perceiving this development as further threatening its vital interests, the United States responds by placing its nuclear forces on a "red" ready alert. The Soviet Union responds by placing its nuclear forces on ready alert. Negotiations between the Soviet Union and the United States deteriorate and finally break down. Iran's troops begin to cross the border and invade Saudi Arabia.

IF either the United States or the Soviet Union concludes that: (1) negotiations have irretrievably broken down and are of no further avail and (2) war is surely coming, then, under these circumstances, voices on both sides will be raised declaring that a nuclear first-strike is fully "rational". It is better, it will be argued, for us to attack first and destroy as many Soviet missiles as possible, thereby suffering only 25 to 30 million dead Americans from a crippled Soviet nuclear response, than to lose fifty to eighty million or more Americans and most of our nuclear weapons, by waiting and absorbing a full power Soviet nuclear

4. United States, Soviet Union, United Kingdom, France, China, India and although she does not admit it, most people believe Israel has them as well.

5. The Carter Doctrine, 16 WEEKLY COMP. PRES. DOC. 197 (Jan. 23, 1980) which states: "Let our position be absolutely clear: An attempt by any outside force to gain control of the Persian Gulf region will be regarded as an assault on the vital interests of the United States of America, and such assault will be repelled by any means necessary, including military force."

first-strike attack.

Once war is perceived as inevitable in a world where the United States and the Soviet Union each possesses a first-strike capability, it will be declared "rational" to initiate nuclear war in a deteriorating crisis situation in order to destroy the other side's missiles and limit casualties. If one accepts this analysis, is there any American who knows the Soviet mind well enough to predict the exact point at which, in a deteriorating crisis situation, the Soviets will perceive war as inevitable, or vice-versa? Assuming one side or the other perceives war as inevitable, on which side does prudence lie? Shall millions of preventable deaths be risked by not striking first, or shall it be a race between Americans and Soviets to press the button first? A bilateral first-strike situation is inherently unstable, especially during a deteriorating crisis. How should a democracy like the United States respond?

In foreign and military affairs, the general will of the population of a democracy is what the leaders determine it to be, and particularly for nuclear war prospects, what the President determines it to be. In a free society, no president normally would reach any momentous decision without consultation, without considering the widest scope of available opinions, without the best information he can obtain, and without patient and deep reflection on where the common interests of the people lie. But all of this takes time, much time, and time is precisely what is not available in the nuclear timetable. Neither the Congress, the people, nor any other authority, can make the decision for the President. The decision is essentially individual, and therefore autocratic. In the logic of nuclear war, the President, by circumstances of mutual, first-strike capability, is condemned to be a dictator. That is contrary to our democratic order, and a question arises, therefore, as to whether the Constitution applies to this situation.

The War Power

The Constitutional Convention was convened on May 25, 1787, and was concluded on September 17, less than four months later.⁶

6. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 649 (M. Farrand ed. 1911) [hereinafter cited as 2 RECORDS]. There is no complete or entirely reliable record of the Convention's deliberations. The Convention's delegates met in secret and resolved to communicate nothing to non-delegates. 1 RECORDS OF THE FEDERAL CON-

Fifty-five men attended in all, but the significant work was done by far fewer. For the first two months, the Convention devoted itself mainly to discussions, developing and perfecting resolutions. In late July, those resolutions on which agreement had been reached were turned over to the Committee on Detail, and on July 26, the Convention adjourned for ten days, until August 6, to permit that Committee of five to create a draft of the Constitution.⁷

The Committee's draft constitution assigned Congress the power "to make war."⁸ Later on August 17, Charles Pinkney opposed vesting the power to make war in Congress, saying "its proceedings were too slow."⁹ He argued that the "Senate would be the best depository, being more acquainted with foreign affairs and most capable of proper resolution."¹⁰ Pierce Butler countered, saying that if informed judgment and efficiency were the standards to be applied, then the Senate suffered the same disabilities as Congress; consequently, he was "for vesting the power in the President. . . ."¹¹ Thereafter, James Madison and Elbridge Gerry "moved to insert 'declare', striking out 'make' war; leaving to the Executive the power to repel sudden attacks."¹² Roger Sherman thought it stood very well. "The Executive [should] be able to repel and not commence war."¹³ Elbridge Gerry said that he "never expected to hear in a republic a motion to empower th Executive alone to declare war."¹⁴ Oliver Ellsworth observed that "there is a material

VENTION OF 1787, at 10 n.4, xi (M. Farrand ed. 1911) [hereinafter cited as 1 RECORDS]. The Journal of the Convention recorded only the formal motions and the votes thereon. Extensive, but incomplete notes were taken by several delegates — Rufus King, James McHenry, William Pierce, William Paterson, Alexander Hamilton, and George Mason. *Id.* at xvi-xxiv. The most important record, James Madison's notes, was revised thirty years after the convention. *Id.* at vii.

7. 1 RECORDS, *supra* note 6, at xxii. John Rutledge of South Carolina was Chairman, and James Wilson of Pennsylvania an important member.

8. 2 RECORDS, *supra* note 6, at 318: "Mr. Pinkney opposed vesting this power in the legislature. . . ."

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* See also *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40-43 (1800) where Justice Samuel Chase wrote: "Congress is empowered to declare a general war or Congress may wage a limited war. . . ."

14. 2 RECORDS, *supra* note 6, at 318.

difference between the cases of making *war* and making *peace*,"¹⁵ and that "it should be more easy to get out of a war, than into it."¹⁶ George Mason "was against giving the power of war to the Executive, because not [safely] to be trusted with it . . . he was for clogging rather than facilitating war; but for facilitating peace;"¹⁷ thus, "he preferred '*declare*' to '*make*.'"¹⁸ Thereafter, the vote was called and "the motion to insert '*declare*' in place of '*make*' passed."¹⁹

This result is not surprising because the authors of our Constitution had all been reared with the axiom, endlessly repeated before and after the American Revolution, that standing armies and their commanders are always a menace to the liberties of a free people. The dangers posed by a standing army were repeatedly dealt with during the ratification debates, and it accounted for significant opposition to the proposed constitution.

There is no ambiguity or uncertainty about the general intent of the framers of the Constitution with respect to the war power.

[It] was understood by the framers — and subsequent usage confirmed their understanding — that the President in his capacity as commander in chief of the armed forces would have the right, indeed the duty, to use the armed forces to repel sudden attacks on the United States, even in advance of Congressional authorization to do so . . . [and] . . . that he would direct and lead the armed forces and put them to any use specified by Congress but that this did not extend to the initiation of hostilities. . . .²⁰

15. *Id.* at 319 (emphasis original).

16. *Id.*

17. *Id.*

18. *Id.* (emphasis original).

19. *Id.* (emphasis original). By defining the issue in terms of the power to "declare" war, the framers may have confused later generations. The real issue was congressional authorization of hostilities, full or partial, against a foreign sovereign state. The framers meant to vest that power as well as the power ultimately to control general or limited war in the hands of Congress. The President was to be the commander-in-chief, subject to Congress' ultimate control.

20. National Commitments, S. REP. NO. 797, 90th Cong., 1st Sess. (1957), *quoted in* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 417 (10th ed. 1980). In 1801, Chief Justice Marshall, writing for the Court, ruled that the "whole powers of war being, by the Constitution of the United States, vested in Congress . . . the Congress may authorize general hostilities . . . or partial hostili-

In a letter to Madison in 1789, Thomas Jefferson wrote: "We have already given in example one effectual check to the Dog of War by transferring the power of letting him loose from the Executive to the Legislative body. . . ." ²¹

One conclusion is clear: the so-called doctrine of a President attacking first and making war as anticipatory self-defense, allegedly justified by Article 51 of the United Nations' Charter, has no historical standing in American Constitutional law.

The United States had a puny, regular military force of less than 840 men when George Washington assumed the Presidency under the new constitution, ²² nevertheless, the framers sorely worried about war and the dangers posed by the military. They denied the President the power to initiate hostilities and embroil the nation in war. Presidents in the 19th Century interpreted their commander-in-chief powers differently, but on the whole, the basic constitutional framework was generally observed. Presidents did not initiate war. Summarizing the war power in the 19th Century, Robert William Russell wrote:

It is not a simple matter to arrive at conclusions concerning this period in which the constitutional interpretation was far from consistent, where Grant's extreme view is sandwiched between the conservative views of Buchanan and Cleveland. But there was one opinion that enjoyed wide acceptance: the President could constitutionally employ American military force outside the nation as long as he did not use it to commit "acts of war." While the term was never precisely defined, an "act of war" in this context usually meant the use of military force against a sovereign nation without that nation's consent and without that nation's having declared war upon or used force against The United States. To perform acts of war, the President needed the authorization of Congress

This dividing line between the proper spheres of legislative and executive authority was sufficiently flexible to permit the President to use military force in unimportant cases, while preserving the role of Congress in important decisions. The acts of war doctrine was probably a step beyond what the framers intended when they changed the Congressional power from "make" war to "declare"

ties. . . ." *Talbot v. Seaman*, 5 U.S. (1 Cranch.) 1, 28 (1801).

21. See G. GUNTHER, *supra* note 20, at 418.

22. A. SOIFER, *FOREIGN AFFAIRS AND CONSTITUTIONAL POWER* 116 (1976).

war, and was certainly a move in the direction of Presidential power compared to the cautious stance of Washington, Adams, Jefferson, and Madison. The central objective which the Constitution sought — Congressional authority to approve the initiation of major conflicts — was undamaged, but certain fraying of the edges had occurred. This slight deterioration was greatly accelerated during the following 50 years.²³

The 19th Century presidents used the military forces in “hot pursuit” of bands of pirates or bandits or to protect American lives and property under treaties conferring rights and obligations on the United States. But early 20th Century presidents — Theodore Roosevelt, Taft, and Wilson — expanded the scope of presidential power by using military force against small sovereign states, and Congress did not resist.²⁴ Later, in 1941, “President Roosevelt, on his own authority, committed American forces to the defense of Greenland and Iceland and authorized American naval vessels to escort convoys to Iceland”;²⁵ thus, “by the time Germany and Italy declared war on the United States, in the wake of the Japanese attack on Pearl Harbor, the United States had already been committed by its president, acting on his own authority, to an undeclared naval war in the Atlantic.”²⁶

The trend begun by Theodore Roosevelt, Taft, and Wilson, and accelerated by Franklin Roosevelt, increasingly continued under Presidents Truman, Eisenhower, Kennedy, Johnson, and Nixon, “bringing the country to the point at which the real power to commit the country to war is now in the hands of the president.”²⁷ thus, the power to conduct foreign affairs,²⁸ the campaign for government secrecy, and the

23. R. Russell, *The United States Congress and the Power to Use Military Force Abroad* (Ph.D. thesis, Fletcher School of Law and Diplomacy, 1967) reported in NATIONAL SENATE COMM. ON FOREIGN COMMITMENTS, S. REP. NO. 797, 90th Cong., 1st Sess. (1967); quoted in G. GUNTHER, CONSTITUTIONAL LAW 416, 418 (10th ed. 1980).

24. G. GUNTHER, *supra* note 23, at 419.

25. *Id.*

26. *Id.*

27. *Id.* See also *United States v. Curtis-Wright Corp.*, 299 U.S. 304 (1936) where the Court seemingly affirmed an inherent superior presidential power over foreign affairs, not derived from constitutional or statutory sources. Compare *Bestor*, *infra* note 28.

28. For an enlightening analysis of this power, and the meaning of the King's

commander-in-chief powers were combined and used in ways that eventually produced the current "Imperial Presidency".²⁹

The imperial presidency was essentially the creation of foreign policy. A combination of doctrines and emotions — belief in permanent and universal crisis, fear of communism, faith in the duty and the right of the United States to intervene swiftly in every part of the world — had brought about the unprecedented centralization of decisions over war and peace in the presidency. With this there came an unprecedented exclusion of the rest of the executive branch, of Congress, of the press and of public opinion in general from these decisions. Prolonged war in Vietnam strengthened the tendencies toward both centralization and exclusion. So the imperial presidency grew at the expense of the constitutional order. Like the crowbird, it hatched its own eggs and pushed the others out of the nest. And, as it overwhelmed the traditional separation of powers in foreign affairs, it began to aspire toward an equivalent centralization of power in the domestic polity.³⁰

However, the war powers as spelled out in the Constitution and its balances between Congress and the President are not obsolete. All that is required is for Congress actively and continually to reassert its constitutional authority over the use of American military force. Ultimately, congressional action will be founded upon enlightened, press influenced public opinion. This opinion obviously will affect the presidency since that office is also highly susceptible to public influence.

A first step was taken by Congress when it passed the War Powers Resolution in 1973, stating its purpose was

to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such

power of "advice and consent," see Bestor, *Separation of Powers in the Domain of Foreign Affairs*, 5 SETON HALL L. REV. 527 (1974).

29. For discussion, see A. SCHLESINGER JR., *THE IMPERIAL PRESIDENCY* (1973).

30. *Id.* at 207.

situations.³¹

This legislation, however, does not fully restore the intent of the framers. The framers did not rely on the *collective* judgment of Congress and President to initiate hostilities, but solely on Congressional declaration to introduce military forces into hostilities, except in limited cases of presidential repulsion of a sudden attack on the United States. Nevertheless, the statute is useful, so long as it is seen as a first step to be followed by others. It confirms the constitutional position that the doctrine of presidentially created war as anticipatory self-defense has no constitutional standing, and it helps to restore part of the constitutional balance. The rest of the balance can be restored if the American people have the will and have the vision to do so. Alexander Hamilton was prophetic in seeing the consequences of a people living in a garrison state. He implied the need for continuous vigilance by the people. In a striking passage, Hamilton observed "safety from external danger is the most powerful director of national conduct, . . . [and] . . . [e]ven the ardent love of liberty will, after a time, give way to its dictates."³² Hamilton prophetically concluded that the "violent destruction of life and property incident to war—the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty, to resort for repose and security, to institutions, which have a tendency to destroy their civil and political rights."³³

31. The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

Pub. L. No. 93-148, § 2, 87 Stat. 555, 93d Cong., 1st Sess., 1488 (H.R.J. Res. 542, 93d Cong., 1st Sess. adopted over Presidential veto on Nov. 7, 1973). (This statute is an unusual, quasi-constitutional variety of congressional action, not setting forth substantive policy but processes and relationships. Query: is it clear, is it not, that Congress did not go far enough and failed to restore the original intent?)

32. THE FEDERALIST No. 8, at 45 (A. Hamilton) (J. Cooke ed. 1961).

33. *Id.*

Presidential Power and Nuclear War

It seems relatively straightforward to conclude that the President has no constitutional power to initiate a nuclear war by authorizing a preemptive nuclear first-strike. That clearly would be a functional "declaration" of war in its most emphatic and destructive form, and only Congress has that power under our Constitution. Moreover, as the United Nations repeatedly has declared, the threat or use of nuclear weapons is a "crime against mankind and civilization."³⁴

But does the President, after receiving a radar or other report of an incoming wave of nuclear missiles, have constitutional power to authorize a responsive nuclear missile strike? The War Powers Resolution of 1973 permits the President "to introduce United States Armed Forces into hostilities"³⁵ in the event of "a national emergency created by attack upon the United States . . . or its armed forces."³⁶ This provision clearly contemplates the use of military manpower and it may be so limited, but arguably it may also include hardware, such as nuclear missiles. Thus, the statutory situation is somewhat murky. Yet clearly, a nuclear attack on the Soviet Union based on radar alone, or some other report, does not come within the statute because the reports may, like others in the past, be in error. At that moment only a report exists and neither the United States nor its armed forces have actually been "attacked". The doctrine of anticipatory self-defense by a President is ruled out. Likewise, the situation would not fall within the provision of the President's Constitutional power to repel sudden attacks because the "attack" had not yet occurred. On the other hand, if the reports were true and if the President waited until after the "attack" on the United States actually occurred, he may be left with very few, if any, missiles with which to respond. Of course, in such a situation, a question exists concerning the good to be achieved by authorizing a responding nuclear attack with the remaining missiles, which would only produce another nuclear attack on the United States with the Soviet Union's remaining missiles.

34. G.A. Res. 1653, 16 U.N. GAOR Supp. (No. 17) at 4, U.N. Doc A/5100 (1961). This resolution was adopted Nov. 24, 1961, by a vote of 55-20, with 26 abstentions. The United States voted "No". The U.S.S.R. voted "yes".

35. *See supra*, note 31.

36. *Id.*

It may be true that neither the Constitution nor the War Powers Resolution was designed to apply to the conditions of nuclear war. Nuclear war is fundamentally different from warfare by tank, machine gun, and airplane. It is a crime against humanity. But, under the Constitution as it currently exists, it appears reasonably correct to conclude (1) that the President has no constitutional power to order a pre-emptive, nuclear first-strike and thereby initiate nuclear war; (2) that the President has no constitutional power to order a nuclear attack solely in response to reports of an incoming wave of missiles, and (3) that the President has no emergency power to "repel" a nuclear attack already fully completed. If the President has any power, it would only be to repel a nuclear attack on the United States that is in process by authorizing a responding nuclear attack after the United States actually has been attacked. Of course, by then, there may be very little left with which to respond or little reason to do so. It is difficult to see how an American nuclear attack on the Soviet Union authorized during or following a nuclear attack on the United States by the Soviet Union can be characterized as "repelling" the initial attack. Nothing is "repelled", and the concept loses its meaning in a nuclear context. Moreover, the whole concept of presidential power "to repel a sudden attack" on the United States presupposes (1) that the purpose of such presidential power is to gain time sufficient for Congress to convene and act, and (2) that things called "Congress", "the United States", and "the American people" will continue to exist after the President exercises his power to repel sudden attack. If neither of these two presuppositions exist, as neither would if we absorbed a full, nuclear strike from the Soviet Union, then the whole rationale for the concept of presidential power "to repel sudden attack" disappears. Rather clearly, it seems, the existence of a first-strike posture in the possible use of nuclear weapons is unconstitutional and should be dropped as a policy option.³⁷

A president may act contrary to the constitutional requirements in each of the above three situations, arguing emergency presidential prerogative,³⁸ a doctrine dangerous to a free society. The founding fathers

37. For a recent discussion of this point solely as a matter of policy, see Bundy, *Nuclear Weapons and the Atlantic Alliance*, 60 *FOREIGN AFFAIRS* 753 (Spring 1982).

38. Machiavelli argued that all republics in times of crisis need a dictatorship

did not completely deny power to use military force to the President. They permitted him to repel a sudden attack, and this recognizes, in part, an emergency power in the President, but the prerogative is not unqualified. Nevertheless, some presidents have gone well beyond their carefully circumscribed power. It appears that Lincoln acted on a theory of wide presidential prerogative during the Civil War,³⁹ as did Roosevelt during World War II,⁴⁰ and Kennedy during the Cuban Missile Crisis.

So long as presidents believe they will be successful in their actions, they will continue to claim emergency prerogative. But, what would count as "success" in any of the above three situations involving nuclear war? Our safety may turn on the quirks of mind of a particular president and on how he judges "success" and how he sees himself in the annals of history. The pathway to real "success" is set forth in Professor Arthur Miller's article.

Professor Miller's stimulating and welcome analysis, seeking to change our modes of thinking about nuclear war, goes well beyond my argument set forth above. He holds that the manufacture, deployment, and use of nuclear weapons are unconstitutional. By focusing solely on

and that it was better to provide for one by law than to have power usurped. "[R]epublics which, when in imminent danger," Machiavelli said, "have recourse neither to a dictatorship, nor to some form of authority analagous to it, will be ruined when grave misfortune befalls them." 1 N. MACHIAVELLI, *THE DISCOURSE* ch. 34, 291 (Routledge ed. 1950). Two and a half centuries later, Rousseau argued that the "ability to foresee that some things cannot be foreseen is a very necessary quality;" that the "sacrosanct nature of the laws never should be interfered with save when the safety of the state is in question," and at that point "the People's first concern must be to see that the State shall not perish." 4 J. ROUSSEAU, *SOCIAL CONTRACT* ch. 6, 415-16 (Oxford ed. 1947). Even John Stuart Mill stated he was "far from condemning, in cases of extreme exigency, the assumption of absolute power in the form of a temporary dictatorship." J. MILL, *Considerations on Representative Government*, *THE PHILOSOPHY OF JOHN STUART MILL* 408 (M. Cohen ed. 1961).

39. See *Emancipation Proclamation*, Jan. 1, 1863, VIII A. LINCOLN, *COMPLETE WORKS OF ABRAHAM LINCOLN* 161 (Nicolay & Hay eds. 1894), and letter from Abraham Lincoln to Secretary Chase (Sept. 2, 1863) (which appears in IX A. LINCOLN, *COMPLETE WORKS OF ABRAHAM LINCOLN* 108 (Nicolay & Hay eds. 1894)); E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 382 (1940).

40. See Murphy, *Request of the Senate for an Opinion as to the Powers of the President In Emergency or State of War*, 39 Op. Att'y Gen. 343-48 (1939); 10 F. ROOSEVELT, *PUBLIC PAPERS AND ADDRESSES* 1941, at 195 (1950).

the limited presidential power to repel attack, my argument is narrower but parallels his, seeking to demonstrate only that the presidential core of our nuclear first-strike capability strategy is unconstitutional. Professor Miller broadly attacks the nuclear establishment as a whole, arguing boldly that constitutional law is instrumental and that it places a duty on government officers NOT to take any action that, on balance, unreasonably jeopardizes the well-being of the populace or "posterity." He argues that constitutional law imposes a duty of negative content. Although this part of the argument is neither set forth comprehensively nor definitively, I find Professor Miller's preliminary statement persuasive.

Two additional arguments and a general conclusion present some surmountable difficulties. First, Professor Miller argues that international law partially defines the duties the Constitution places on governmental officers because it is incorporated into our constitutional law.⁴¹ Second, he argues that international law, as stated by Richard Falk and his colleagues, declares that any threat or contemplated use of nuclear weapons constitutes a crime of state.⁴² The duty of government officials, he argues, then becomes clear: "to take action to help prevent that 'crime of state.'"⁴³ Accepting the validity of the above two arguments for discussion purposes, the requirement that government officials "take action" does not follow from the prior general duty of negative content that officials take no action that unreasonably jeopardizes the well-being of the American people. Another step is needed, a constitutional judgment from the Supreme Court that the current manufacture, deployment, and contemplated use of nuclear weapons unreasonably jeopardizes American well-being. Once that reasonable judgment is made, then Professor Miller's arguments take hold and Congress comes under a duty to act to undo the jeopardy to the American people. In doing so, it prevents a "crime of state". Such judgment from the Supreme Court of the United States is, however, most unlikely. That prospect, though, should not deter vigorous discussion of this vital subject.

Should international law be part of constitutional law? Professor

41. Miller, *Nuclear Weapons and the Constitution*, 7 NOVA L.J. 21 (1982).

42. *Id.* at 33.

43. *Id.*

Miller argues it should. Surely, the part of international law that conflicts with the Constitution cannot be. My argument above indicates, however, that part of international law outlawing a nuclear first-strike position does not conflict with American constitutional law. Thus, that portion of international law could be incorporated into American constitutional law. Professor Miller's preliminary, creative, result-oriented affirmative argument is intriguing indeed. Anyone who takes law and humankind seriously must agree with his goal to eliminate nuclear weapons. Yet, I suspect American officials will not accept Professor Miller's argument without also knowing it has been agreed to by the Soviets. Nevertheless, by opening debate, Professor Miller puts us in his debt.

Professor Miller is quite right when he states that we must invent the legal means, whether his or others, by which the world can peacefully settle the issues that previously have been settled by war. Until the necessary legal means are created and institutionalized, any reduction in the steadily increasing probability of nuclear catastrophe is unlikely in the absence of effective negotiations on the control, reduction and elimination of arms. The limited progress that has been made to control nuclear arms has come as a result of direct negotiations between the nuclear powers, and, in this country, has been accompanied by enlightened citizen demands. In the United States, citizen enlightenment in the area of arms control is crucial, but, happily, as John Jay saw long ago, citizen interest in this area endures. "Among the many objects to which a wise and free people find it necessary to direct their attention," Jay declared, "that of providing for their *safety* seems to be first"; and that means their "security for the preservation of peace and tranquility, as well as against dangers from *foreign arms and influence*, as from dangers of the *like kind* arising from domestic causes."⁴⁴ Thus, the legal profession becomes deeply implicated because it consists of professionals whose skills are necessary to save mankind from nuclear war. Lawyers have skills to separate fact from fancy; they can understand nuclear strategies, and they can explain to the public the dangers and constitutional status of our current nuclear posture. Lawyers also are negotiators and indispensable advisors to policy makers. They nego-

44. THE FEDERALIST No. 3, at 14 (J. Jay) (J. Cooke ed. 1961) (emphasis original).

tiate lasting agreements founded on the existence of common or compatible interests, including common and compatible interests of the Soviet Union and the United States. It is these lawyerly skills, employed in the service of Professor Miller's vision, that are sorely needed today by the American people for their posterity. May they be forthcoming.

A Grenville Clark Hypothetical*

Gerald T. Dunne**

In any discussion of Nuclear Weapons, Grenville Clark (1882-1967) is an important figure. He had a long, happy, and successful life. Born to wealth, power, and position, his historic achievements included distinction in two wars—launching the Plattsburg training camps which were the catalyst of the Preparedness Movement in World War I, and in World War II virtually single-handedly securing the enactment of the Selective Service and Training Act of 1940 which produced a minimally armed America on the eve of Pearl Harbor. Peacetime attainments must include organization of a critical resistance to FDR's court-packing plan of 1937 and revitalization of the Federal Civil Rights Act. Most significant, however, was his response to Secretary Stimson's post-Hiroshima charge to "go home and stop World War III". Though racked with cancer, Clark gave the last full measure of devotion in attempting, through proposals for disarmament, world government, and world law, to forestall terminal nuclear holocaust. This surely will be his enduring achievement.

Grenville Clark went to his grave in early 1967, believing that his life and work, notwithstanding intermediate success had been an ultimate failure; his sunset efforts to alarm the human race to the mortal peril which beset it seemed to have availed nothing; if anything that peril had only proliferated and magnified during his effort to constrain it. Nonetheless he had striven mightily, expending personal fortune and dwindling physical resources in writing, speaking and traveling. A measure of his concern could be glimpsed in his approach to a public relations expert (a maneuver unthinkable otherwise) to promote sales of a landmark book, *World Peace Through World Law*. The expert, Edward Bernays, who had seen all manner of men in his time, expressed an expert probatory judgment: "His personality was most aristocratic,

* Adapted and revised from the forthcoming book, *GRENVILLE CLARK: PUBLIC LIFE, PRIVATE MAN*.

** Professor of Law, St. Louis University.

and his behavior gentle and unassuming. I liked him.”¹

Nonetheless, the impact of personality could go just so far, and in the scale of Grenville Clark’s grand design, it was not far enough. The nuclear danger impended and worsened with inertia, the strongest force in human affairs deployed on the side of confrontation and potential disaster. Then two things happened.

The Diplomat

On May 19, 1981, George F. Kennan received the Einstein Award. In any case, an award to Kennan would have merely gilded the lily; Kennan had already left his mark on his times; his credentials ran from the first blueprint for Soviet containment, expressed in a famous “Mr. X” article in *Foreign Affairs* in 1947² to *persona non grata* expulsion from the USSR in 1953. Kennan’s laureate response was in a totally different idiom than his “X” article; it denounced:

the supreme sacrilege of putting an end to the civilization out of which we have grown, the civilization which made us what we are, the civilization, without which our children and grandchildren can have no chance of self-realization, possibly no chance for life itself.³

Kennan went on to stress “the admonition to neglect nothing — no effort, no unpleasantness, no controversy, no sacrifice — which could conceivably help preserve us from committing this fatal folly.”⁴ He then reached the core of his argument against nuclear weaponry:

I question whether these devices are really weapons at all To my mind the nuclear bomb is the most useless weapon ever invented. It can be employed to no rational purpose. It is not even an effective defense against itself. It is only something with which, in a moment of petulance or panic, you commit such fearful acts of de-

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1. Letter from Edward Bernays to Gerald Dunne (May 19, 1981).
 2. Kennan, *The Sources of Soviet Conduct*, 25 FOREIGN AFF. 566 (1947).
 3. Address by George Kennan, Albert Einstein Peace Prize Foundation (May 19, 1981) (condensed in *The Illusion of Security*, St. Louis Post Dispatch, May 31, 1981, at E2, col. 4).
 4. *Id.*

struction as no sane person would ever wish to have on his conscience.⁵

Kennan admitted that his admonitions were not new but rather restatements of what "wise and far-seeing people" had been asserting for "over thirty years." He named names, beginning with Albert Einstein and concluding with every president of the United States from Dwight Eisenhower to Jimmy Carter.⁶

He did not name Grenville Clark, whose book *World Peace Through World Law* expressed his thesis in extended and systematic form. Perhaps the omission was deliberate, for in 1948 (in Clark's view at least) the laureate was an integral part of the "Truman-Leahy-Marshall-Levett (sic)-Kennan-Harriman combination" whose "fixed ideas" were frozen into an icy Cold War carapace.⁷

In a subsequent *New Yorker* article,⁸ Kennan edged close to Clark in several planes of encounter. One was a plea for a less demonic perception of the Soviet adversary. A second insisted on the quantum difference separating nuclear arms from conventional ones. The third could have been vintage Clark, as far as it went:

there are many people who consider it useless, or even undesirable to try to get rid of these weapons entirely, and that a satisfactory solution can somehow be found I believe that until we consent to recognize that the nuclear weapons we hold in our own hands are as much a danger to us as those that repose in the hands of our supposed adversaries there will be no escape from the confusions and dilemmas to which such weapons have now brought us⁹

5. *Id.*

6. *Id.*

7. Letter from Grenville Clark to Cord Meyer (Feb. 28, 1948), *quoted in* J. Bantell, *Perpetual Through World Law* 217 (1979) (unpublished doctoral dissertation, University of Connecticut).

8. Kennan, *Reflection on the Soviet Union*, *The New Yorker*, Nov. 2, 1981, at 54, 62; *cf.* 6 G. CLARK, *A PLAN FOR PEACE* 16-18 (1954 condensation).

9. Kennan, *supra* note 8, at 62.

The President

In his article Kennan turned to the subject of nuclear weapons "with a sigh and a sinking of the heart."¹⁰ However, before type was set, Ronald Reagan, in a thoughtless and casual response at a mid-October 1981 press conference, asserted a belief that a tactical exchange of battlefield weapons could occur between NATO and Warsaw Pact forces "without bringing either one of the major powers to pushing the button."¹¹

The President hardly bargained for the reponse he got. The following weekend, hundreds of thousands of people, finally comprehending the possibilities of atomic war involving *them*, marched in protest through the streets of London, Paris, Brussels and Rome. Clark had indeed foreseen the possibility, and remarkably George Kennan, his old adversary, cited that prophetic vision accepting the Grenville Clark Prize at Dartmouth College on November 16, 1981:

if the various governments did not find a way to put a stop to this insanity, the awareness of the indescribable dangers it presented would some day, as [Clark] put it "penetrate the general masses of the people in all nations" with the result that these masses would begin to put increasing and indeed finally irresistible pressure on their governments to abandon the policies that were creating this danger.¹²

Kennan called the recent growth of the anti-nuclear war movement the most striking phenomenon of the early 1980s. Within twenty-four hours his appraisal was vindicated; President Reagan in a hastily arranged speech at the national Press Club, eschewed all talk of pushing buttons, but rather offered the Soviets a reciprocal pull-back of all tactical nuclear weapons from actual or proposed deployment.

It remained an open question whether the presidential proposal would be accepted at all, or if accepted would provide merely the continuation of an uneasy truce or offer an actual threshold to a genuine peace. Nonetheless, the mere fact of enunciation represented the tri-

10. *Id.*

11. Wall St. J., Nov. 2, 1981, at A1, col. 1.

12. Address by George Kennan, Dartmouth College (Nov. 16, 1981).

umph of an idea as well as the extension of the moral and intellectual force of one man—a man dead now fourteen years and born almost a century earlier—whose life and achievement exemplified the reiterated assertion of a long time friend that the only certainty of history was that men would make it.

Men make history far more by ideas than by actions, and Arthur Selwynn Miller's four incisive constitutional propositions for planetary survival may be truly seminal. As a lifelong man of law, Grenville Clark would have been arrested by them.

Indeed to the Miller quadrilateral, Clark could well add three core propositions of his own. One would be a thesis from the preamble of his Declaration of the Second Dartmouth Conference on peace, disarmament, and world survival, which, *mutatis mutandis*, might itself serve as Miller's *leitmotif*:

The highest sovereignty on earth resides in the peoples who inhabit the plant. National sovereignty is justified only as it safeguards the basic sovereignty of the peoples themselves. Since in a nuclear age, national sovereignty alone cannot serve its highest obligation, it must be buttressed. . . .¹³

Second, and especially apposite here would be Clark's talent for persuasively extrapolating values implicit in the constitutional design to the necessities of the hour, a process involving a mutational change in the document itself. Here would stand his landmark Supreme Court briefs. The first, submitted in *Hague v. CIO*¹⁴ was a critical component of the process which rescued the Federal Civil Rights Act from atrophy and made the statute a vital force in American life.¹⁵ The other, in *Minersville School District v. Gobitis*,¹⁶ drew on language, logic, and history for an eventually dominant constitutional constraint against collective ritualism violative of conscience. Such intrusions were to be subjected to the strictest of judicial scrutiny.

13. Declaration of the Second Dartmouth Conference, Dublin, N.H. (Oct. 5, 1965).

14. 307 U.S. 496 (1939).

15. For a discussion of the case see Gibbons, *Hague v. CIO: A Retrospect*, 52 N.Y.U. L. REV. 738 (1977).

16. 310 U.S. 586 (1940).

In the third place, or perhaps in the first, would be Clark's hard-bitten realization that notwithstanding formularies and institutional arrangements, public opinion was the dominant force in bringing results to pass in the domain of policy. More than this, the existing procedures of the law could well afford the ideal vehicle for placing the Miller quadrilateral in appropriate posture for adversary scrutiny, public debate, and eventual judicial declaration. More than that, under the touchstone of declaratory judgment, it can go forward to eventual resolution galvanizing and shaping the sentiment which will in due course afford it vitality.

In Brief Rejoinder

Arthur S. Miller

The editors of the *Nova Law Journal* have invited me to comment upon the responses that were received to my preliminary foray into the applicability of constitutional norms to nuclear weapons. I am happy to do so.¹ At the outset, I should like to express my deep appreciation to those who took time from their busy schedules to write responses, as well as the editors of this *Journal* for making the symposium possible. It is, I believe, the first attempt by a legal periodical to tackle from a constitutional standpoint what by all odds is the overriding moral and political (and thus constitutional) question of the day.

Lawyers of whatever specialty have until quite recent times ignored the problems attendant to the manufacture, storage, deployment and possible—even probable—use of weapons that threaten the very fabric of civilization as we know it. Now, however, two groups of lawyers have been formed—one with Boston headquarters and the other centered in New York City; members of the American Bar Association, as well as other bar associations, are beginning to focus upon the growing peril. That is all to the good: lawyers, as Professor Levinson suggests, can play an important role in the developing dialogue. They exemplify in modern version what Samuel Johnson said long ago: “Depend upon it, Sir, when any man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully.”² For the first time since Hiroshima and Nagasaki were all but obliterated in August, 1945, the minds of lawyers—some but far from all of them—are beginning to concentrate upon what Jonathan Schell has called “the fate of the earth.”³

1. Although mention will be made of several responses, this rejoinder is general in nature. It seeks to extend the argument, rather than to comment upon each of the responses in detail.

2. 6 J. BOSWELL, *THE LIFE OF SAMUEL JOHNSON* 309 (W. Crocker ed. 1846) (1st ed. London 1791).

3. J. SCHELL, *THE FATE OF THE EARTH* (1982).

The need, as Professor Dunne adumbrates, is for a “mutational change”⁴ in our modes of thinking about constitutions and constitutionalism. If, as Paul Freund once observed, the Supreme Court is a theme that forces lawyers to become philosophers,⁵ the very existence of nuclear weapons forces everyone, including lawyers, to think deeply about the nature of American constitutionalism. Professor Ball tells us that when Congress was delegated the “power to declare war,” it did not include “the power to declare Armageddon.”⁶ Indeed, it does not. Nor does the President have such a power, now that he, because of long-standing Congressional ineptitude and pusillanimity, has become the person who can precipitate a nuclear holocaust. True enough, the President has the *ability* to engage in nuclear war, either by responding to external attack or by use of a first strike, but if constitutionalism means anything it must be taken to mean that such an ability cannot be equated with constitutional propriety. As Professor Jenkins reminds us, the central concept of *raison d'état* becomes irrelevant and inapplicable with nuclear weaponry, simply because the survival of the nation—the fundamental purpose of that silent constitutional principle—cannot be guaranteed.⁷

When the deep-thinkers of the national security establishment speak about nuclear war, they mention sooner or later what would be an “acceptable” number of Americans killed in such a war. The figure usually runs into tens of millions. Of course, the nuclear planners are making provision for the safety of key figures in government. A command center has been hollowed out of a hillside in Virginia, furnished with equipment and supplies and suitably protected. For ordinary Americans a “civil defense” program is envisaged (some \$4.3 billion is allocated to it in the current budget). Cities will be evacuated, but no one quite seems to know how, say, the residents of New York or any other major city will survive. An official in the Pentagon has suggested that everyone should get a shovel, dig a hole, cover it with a couple of doors and throw three feet of dirt on top of it—after which a person or a family presumably will huddle in the hole until danger ceases. The

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4. Dunne, *A Grenville Clark Hypothetical*, 7 NOVA L.J. 167, 171 (1982).
 5. P. FREUND, ON UNDERSTANDING THE SUPREME COURT 1 (1949).
 6. Ball, *Nuclear War: The End of Law*, 7 NOVA L.J. 53, 61 (1982).
 7. Jenkins, *Admirable Ends — Ineffective Means*, 7 NOVA L.J. 127 (1982).

absurdity of such a view requires no comment: It bespeaks a mind so dulled by computerized war games and thinking about the unthinkable that the person wallows in a swamp of consummate nonsense. Let no one fail to see the point: there is *no* escape for most Americans should nuclear war break out.

That does not mean, of course, that those who sit in positions of political power do not today and did not in the past toy with the use of nuclear weapons. To take the latter first, recently revealed documents tell us how very close the United States was to using atomic bombs in Indo-China as long ago as 1954—at the time when the French were being defeated at Dienbienphu.⁸ That they were not used, either by American forces or by the French (who had obtained them from the United States), came from a decision taken not on humanitarian grounds but because of a fear of a worldwide public uproar. As for today, in August, 1982, Secretary of Defense Caspar Weinberger was busily engaged in trying to stifle—through representations to the media—the fact that the Reagan administration was prepared to fight a “protracted nuclear war.”⁹ Small wonder, therefore, that the “doomsday clock” on the cover of the *Bulletin of the Atomic Scientists* has moved from seven to four minutes to midnight.

Professor McDowell believes that the idea of a living Constitution “is ultimately at odds with the logic of the Constitution itself.”¹⁰ He of course has a full first amendment right to such a view. The fact that it runs contrary to the vast majority of constitutional scholars will not, and perhaps should not, deter him. How he can square his position with the development of constitutional law in the almost two centuries since 1789 remains completely mysterious. He misreads *McCulloch v. Maryland*,¹¹ and seems to think that Chief Justice Marshall’s allusion to popular sovereignty in *Marbury v. Madison*¹² is the *ne plus ultra* of

8. See Marder, *When Ike Was Asked to Nuke Vietnam*, Wash. Post, Aug. 22, 1982, at C1, col. 1.

9. See Halloran, *Weinberger Angered by Reports on War Strategy*, N.Y. Times, Aug. 24, 1982, at B8, col. 3; Wilson, *Weinberger Lobbies Editors on War Policy*, Wash. Post, Aug. 25, 1982, at A9, col. 1.

10. McDowell, *Nuclear Weapons: Unconstitutional or Just Unjust?*, 7 NOVA. L.J. 145, 146 (1982).

11. 17 U.S. (4 Wheat.) 316 (1819).

12. 5 U.S. (1 Cranch) 137 (1803).

understanding about “the” Constitution.¹³ That just ain’t so. The inescapable point, it seems to me, is that the *meaning* of the Constitution alters with the exigencies faced by succeeding generations of Americans—but the *words* remain the same. Each generation of Americans must undertake the task of writing its own constitution; that, at least, is the clear and unmistakable teaching of history. Professor McDowell does not like that; but he cannot gainsay it. The Constitution has always been relative to circumstances. To repeat Franz Neumann’s point:

No society in recorded history has even been able to dispense with political power. This is as true of liberalism as of absolutism, as true of laissez-faire as of an interventionist state. No greater disservice has been rendered to political science than the statement that the liberal state was a “weak” state. *It was precisely as strong as it needed to be in the circumstances.* It acquired substantial colonial empires, waged wars, held down internal disorders, and stabilized itself over long periods of time.¹⁴

The relevant “circumstance” today is the imminence of nuclear holocaust. Those circumstances call, not for an expansion of governmental power but for the development of means by which government, in Madison’s words, can be obliged “to control itself.”¹⁵ Professor Morris suggests that a constitutional judgment should be made that nuclear weapons “unreasonably jeopardize American well-being.”¹⁶ That is the language of due process, and opens still another argument for the applicability of constitutional norms to the circumstances that confront us.

Professor Alfange asserts that the *Duke Power*¹⁷ case is relevant to the nuclear weapon issue.¹⁸ I cannot agree with his conclusion; but

13. McDowell, *supra* note 10, at 147. For a preliminary inquiry into the meaning of what the Constitution is, see Miller, *Toward a Definition of “The” Constitution*, — U. DAYTON L. REV. — (1983).

14. F. NEUMANN, *THE DEMOCRATIC AND THE AUTHORITARIAN STATE* 8 (1957) (emphasis added).

15. THE FEDERALIST No. 51, at 349 (J. Madison) (J. Cooke ed. 1961).

16. Morris, *The Constitution and Nuclear Defense*, 7 NOVA L.J. 151, 164 (1982).

17. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978).

18. Alfange, *Wisdom, Constitutionality, and Nuclear Weapons Policy*, 7 NOVA

would like to draw upon that Supreme Court decision, and particularly the opinion of Judge McMillan in *Carolina Environmental Study Group v. United States Atomic Energy Commission*¹⁹ which was reversed by the Court. Environmentalists in North Carolina challenged the constitutionality of the Price-Anderson Act, setting monetary limits on the liability for damage resulting from a nuclear power plant. Judge McMillan ruled the statute unconstitutional, stating that "the destruction of the property or the lives of those affected by nuclear catastrophe without reasonable certainty that the victims will be justly compensated"²⁰ violated the fifth amendment.

The Supreme Court reversed—unanimously. Where, then, does that leave us? I maintain that we are left exactly where the plaintiffs were on March 31, 1977 when Judge McMillan issued his opinion. The two situations are not analogous. Chief Justice Warren Burger, speaking for the Court, employed a limited standard of review in what he perceived to be an economic regulation. He found that the Act was neither arbitrary nor irrational; thus it "passe[d] constitutional muster."²¹ Burger also relied upon "an explicit congressional commitment to take further action to aid victims of a nuclear accident in the event that the \$560 million ceiling on liability is exceeded."²² Surely Burger's alleged "reasoning" is inapplicable to nuclear weapons. The point, as Professor Morris tells us, is that the danger created by nuclear weaponry is of such enormity that Americans are being deprived of their right to personal and psychic well-being.²³

Nuclear weapons, accordingly, constitute an "anticipatory taking" contrary to the fifth amendment and an "anticipatory" deprivation of life, liberty and property without due process of law. Due process, Justice Felix Frankfurter stated in 1950, "is that which comports with the

L.J. 75 (1982).

19. 431 F. Supp. 203 (1977). For further discussion of "anticipatory" deprivation of life, liberty and property see Miller, *The Constitutional Challenge of Nuclear Weapons: A Note on the Obligation to Ward off Extinction*, — BROOKLYN INT'L L. J. — (1983).

20. *Carolina Env'tl. Study Group*, 431 F. Supp. at 222.

21. *Duke Power Co.*, 438 U.S. at 84.

22. *Id.* at 93.

23. Morris, *supra* note 16.

deepest notions of what is fair and right and just."²⁴ It means, in current context and to adopt Judge McMillan's classification, that Americans have a right to be free from both the *immediate* and the *potential* effects of nuclear weaponry.²⁵

The immediate effects are bad enough. Storage of bombs and nuclear waste present as yet insoluble problems of safety. Furthermore, as Ruth Leger Sivard has concluded, increasingly vast sums are being spent to purchase what may be an illusory sense of security at the price of economic stagnation, repression, and poverty.²⁶ I have elsewhere sought to draw attention to the emergence of a new "constitution of control";²⁷ surely, nuclear weapons contribute to that development.

The potential effects are far worse. Drawing upon Judge McMillan's opinion, the following conclusions seem to be beyond argument.

First, there is a high probability of nuclear war, coming either by design or by accident.

Second, there is no escape from the impact of nuclear war.

Third, civil defense measures cannot possibly protect the residents of any city in the United States.

Fourth, the risks involved in nuclear weaponry are not the types that a responsible government places upon its citizens.

Fifth, there is no way that Americans can be compensated for losses of life, liberty, or property.

Sixth, nuclear war will be the "last epidemic." There is no way that the health services of the nation could take care of the casualties of such a war.

Given those effects, the conclusion of an anticipatory violation of the fifth amendment is unanswerable.

I do not, it is emphasized, wish to be placed in the position of one who uses constitutional argumentation as "desperate legal acrobat-

24. *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting). As was his practice, Frankfurter did not divulge how he determined those "deepest notions of what is fair and right and just." *Id.* Compare his concurring opinion in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 466 (1947).

25. *Carolina Envtl. Study Group*, 431 F. Supp. at 209.

26. R. SIVARD, *WORLD MILITARY AND SOCIAL EXPENDITURES*, 1981 (1982).

27. See A. MILLER, *DEMOCRATIC DICTATORSHIP: THE EMERGENT CONSTITUTION OF CONTROL* (1981).

ics.”²⁸ The ideas presented may be new, but I do not think they are foolish. If our modes of thinking about constitutions and constitutionalism are to be changed, the basic requirement, in the words of Alexander Pekelis, is to have

the will to discover the will to enlarge the tiny segment of the world we know, the will to learn and to do better, the firm and deepseated conviction that men may, again and again, in everyone's lifetime, see “thin with distance, thin but dead ahead, the line of unimaginable coasts.”²⁹

There may well be an “arrogance of humanism”³⁰—the belief that humankind through the exercise of reason can control the future. Surely, however, we have to act as if what humans do can make a difference, as if they have the intelligence, the will, and the stamina to ward off extinction.

A final note: calling nuclear weapons a constitutional problem does not, of course, mean that they are *ipso facto* not a political problem. As Professors Alfange and McDowell note, those weapons should be dealt with by the political process.³¹ My belief is that the courts, and specifically the Supreme Court, are deeply immersed in politics and, indeed, would be quite meaningless unless seen as part of the political process. Judges are important political actors—now, in the past, and certainly in the future. Professor Judith Shklar has observed that the prevailing ideology of lawyers is “legalism”—the notion that law is something separate and apart from the remainder of society.³² But, as any sociologist of law knows, law and the state are closely intertwined. To call for a political solution to the nuclear threat does not foreclose action by courts. Quite the contrary. The Supreme Court sits as an authoritative faculty of political theory and of social ethics. It can, should the Justices so wish, set standards toward which all Americans can aspire.³³

28. Levinson, Book Review, *Self-Evident Truths in the Declaration of Independence*, 57 TEX. L. REV. 847, 858 (1979).

29. Pekelis, *The Case for a Jurisprudence of Welfare*, in LAW AND SOCIAL ACTION 1 (M. Konvitz ed. 1950).

30. See D. EHRENFELD, *THE ARROGANCE OF HUMANISM* (1978).

31. See Alfange, *supra* note 18; McDowell, *supra* note 10.

32. J. SHKLAR, *LEGALISM* (1964).

33. It is worth special mention that the General Counsel of the Department of

On the other hand, as Professor Gerhard Casper has cogently observed, "constitutional rules are authoritative regardless of whether courts are able to interpret and enforce them."³⁴ Congress and the President, Casper continues, "must be ready to reconsider fundamental constitutional policies and basic propositions of political theory."³⁵ So they do. The Constitution is not a mere lawyers' document, not a plaything (or workthing) of lawyers only. It is the vehicle of the nation's life. And government officers, including the President, swear to "preserve, protect and defend the Constitution of the United States."³⁶ If that means anything, and surely it is not mere *brutum fulmen*, it means cognizance of and adherence to a constitutional duty to insure the preservation of the nation and the values that they are embedded in the Constitution. In the age of thermonuclear bombs, that can only mean the total elimination of such weapons wherever they may be. In sum, no useful purpose is served by calling nuclear weaponry a "policy" question or a problem of "politics," for all branches of government deal with policy and politics.³⁷

Defense, William H. Taft, IV, acknowledges "the existence of the constitutional duty to reduce and, if possible, eliminate the threat that nuclear weapons pose to the individual freedom and rights of Americans set out in the Constitutions." Taft, *Letter from the Government*, 7 NOVA. L.J. 141, 143 (1982). One hopes that Mr. Taft's recognition of such a constitutional *duty* is communicated to the Secretary of Defense, the Joint Chiefs of Staff, and the President — and that they agree that such a duty rests upon their shoulders. I am, of course pleased to learn that my view on the existence of a constitutional duty has drawn the approbation of a high government officer — who, indeed, advances even more constitutional arguments than do I in support of such a position. Mr. Taft's letter merits wide circulation.

34. Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy; A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 473 (1976).

35. *Id.*

36. U.S. CONST. art. II, § 1, cl. 7.

37. For discussion, see A. MILLER, TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT (1982); M. SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS, (1981); J. GRIFFITH, THE POLITICS OF THE JUDICIARY (1977); Griffith, *The Political Constitution*, 42 MOD. L. REV. 1 (1979); Miller, *Dames & Moore v. Regan: A Political Decision by a Political Court*, 29 U.C.L.A. L. REV. 1104 (1982).